MOTION FILED APR 11 1947
133

No. —, ~~Original~~ Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1946

EX PARTE JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION

IN THE MATTER OF THE PETITION OF JOHN F. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONERS

FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

v.

THE HONORABLE PEIRSON M. HALL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND THE CLERK AND OTHER OFFICERS OF SAID COURT

PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. —, ORIGINAL

EX PARTE JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION

IN THE MATTER OF THE PETITION OF JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONERS

FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

v.

THE HONORABLE PEIRSON M. HALL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND THE CLERK AND OTHER OFFICERS OF SAID COURT

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

Petitioners respectfully move this Court:

1. For leave to file the petition, hereto annexed, for a writ of mandamus and/prohibition and/or

739319—47——1

injunction, under Sections 262 and 234 of the Judicial Code.

2. That a rule be entered and issued directing the Honorable Peirson M. Hall, Judge of the District Court of the United States for the Southern District of California, and the Clerk and other officers of said court, to show cause why a writ of mandamus and/or prohibition and/or injunction should not issue against them, in accordance with the prayer of said petition, and why petitioners should not have such other and further relief as may be just and proper.

3. That argument be heard on the aforesaid rule to show cause immediately following the argument in the case of *John H. Fahey and A. V. Ammann, individually and respectively as Federal Home Loan Bank Commissioner and Conservator for the Long Beach Federal Savings and Loan Association* v. *Paul Mallonee et al*, No. 687, this Term, which is now scheduled for argument on or about April 30, 1947.

GEORGE T. WASHINGTON,
Acting Solicitor General.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. —, Original

Ex Parte John H. Fahey and A. V. Ammann, Individually and Respectively as Federal Home Loan Bank Commissioner and Conservator for the Long Beach Federal Savings and Loan Association

In the Matter of the Petition of John F. Fahey and A. V. Ammann, Individually and Respectively as Federal Home Loan Bank Commissioner and Conservator for the Long Beach Federal Savings and Loan Association, Petitioners For a Writ of Mandamus and/or Prohibition and/or Injunction v. The Honorable Peirson M. Hall, Judge of the District Court of the United States for the Southern District of California, and the Clerk and Other Officers of Said Court.

PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

The petition of John H. Fahey and A. V. Ammann, individually and respectively as Federal Home Loan Bank Commissioner and Conservator for the Long Beach Federal Savings and Loan Association, for a writ of mandamus and/or prohibition and/or injunction against the Honorable Peirson M. Hall, Judge of the District Court of the United States for the Southern District of

California, and the Clerk and other officers of said court, respectfully shows:

1. The instant petition for a writ of mandamus and/or prohibition and/or injunction is directly connected with, and is in aid of this Court's appellate jurisdiction in, the case of John H. Fahey and A. V. Ammann v. Paul Mallonee et al., No. 687, this Term, now pending on appeal, from a judgment of a three-judge District Court for the Southern District of California, Central Division. Probable jurisdiction of said cause was noted by the Court on December 9, 1946, and the cause is set for argument at the session of the Court commencing on April 28, 1947.

I

2. A brief history of the course of litigation in No. 687 is as follows:

a. The Long Beach Federal Savings and Loan Association was organized under Section 5 of the Home Owners' Loan Act of 1933, and is supervised by the Federal Home Loan Bank Administration. Pursuant to Section 5 (d) of that Act, specifically authorizing appointment of a conservator and regulations issued thereunder, A. V. Ammann was appointed, on May 20, 1946, conservator of the Association by the Federal Home Loan Bank Administration. Said conservator took peaceable possession of said Association on that day. On May 27, 1946, appellees Mallonee et al. (shareholders in the Association) brought

this action in the District Court for the Southern District of California. They prayed for the return of the Association to the old management, as well as for other relief. Seeking to enjoin enforcement of Section 5 (d) on the ground that it was unconstitutional, appellees requested a three-judge court; motions for preliminary partial relief were filed by appellees, and motions to dismiss for failure to state a cause of action and for lack of jurisdiction by appellants (petitioners herein), and a hearing on these motions was held by the three-judge court on July 15, 1946. On September 5, 1946, the three-judge court issued an opinion holding Section 5 (d) unconstitutional as unlawfully delegating legislative authority, and on September 30, 1946, that court entered what amounts to a final decree, granting all relief prayed for by appellees' complaints, including the complete restoration of the old management, and a permanent injunction against appellants' "ever asserting any claim, right, title or interest" in or to the property of the Association.

b. The three-judge court denied any stay of enforcement pending appeal, and the old management was returned to possession and control of the Association on the evening of September 30, 1946. On October 1, 1946, Mr. Justice Rutledge stayed execution of the decree (excepting the injunction against merger of the Association with any other institution), and ordered that if the old management had already taken possession of the Asso-

ciation, the conservator should be placed back in possession forthwith. On October 2, 1946, the conservator resumed possession and control and he has since been acting as such conservator.

c. An appeal from the decree of the three-judge court was immediately taken by appellants, and the transcript of record was docketed in this Court on November 9, 1946, as No. 687.

d. On November 9, 1946, appellees moved this Court to vacate the stay and to restore the Association to its old management pending the appeal. After a hearing before Mr. Justice Rutledge and a reference by him of the application to the entire Court, the motion was denied by the entire Court on December 9, 1946.

e. As stated above, probable jurisdiction was noted on December 9, 1946, and the cause is set for argument during the session commencing April 28, 1947.

3. During the pendency of the appeal in No. 687, appellees in that cause secured from the Honorable Peirson M. Hall, Judge of the District Court of the United States for the Southern District of California (one of the judges composing the three-judge court) an order directing a hearing on the motions of appellees Mallonee et al. (shareholders), of appellee Long Beach Federal Savings and Loan Association (acting through its former management), and of appellee Title Service Company, for interim orders approving and

allowing costs and expenses to them, and approving and allowing attorneys' fees to their attorneys. These sums were to be payable out of the sum of $850,000 deposited in the registry of the District Court, in the course of this litigation, as explained in paragraph 4 below. Copies of the affidavits and other documents filed by the movants in connection with these motions, as well as the pleadings in opposition filed by petitioners herein (appellants in No. 687), are attached hereto.

4. During the course of the litigation in the District Court, an intervenor (Home Investment Company) deposited in the court's registry, pursuant to court order, the sum of approximately $800,000, which sum represented amounts due to the Long Beach Federal Savings and Loan Association on account of loans made by it upon certain trust deeds, and said sums constituted payment in full of said loans. This money admittedly belongs to the member shareholders of the Association. The deposits by said intervenor were made necessary by the refusal of the appellee Title Service Company (a corporation managed and directed by practically the same officers and directors who were in charge of Long Beach Federal Savings and Loan Association before the appointment of the Conservator), which is the trustee under said trust deeds, to execute releases, and reconveyances thereof with-of without such deposit, on the ground that the Conservator was illegally in control of the Asso-

ciation. Accordingly, without objection, said sum was paid into the District Court's registry instead of directly to the Association and appropriate releases and reconveyances thereafter made. $50,000 of the sum in the court's registry represents a draft in that amount, payable to one Robert H. Wallis (also an appellee in No. 687), who filed a cross-claim in interpleader in connection with said draft. This check apparently represents one-half of the sum of $100,000 appropriated by the Board of Directors of the Association, prior to the establishment of the conservatorship, for the purposes of litigation against the Federal Home Loan Bank Administration; the improper diversion of said sum was one of the reasons for the appointment of the Conservator (Record in No. 687, p. 89–90).

5. Out of this sum in the registry of the District Court, the movants asked to be reimbursed in an amount approximating $20,000, for costs and expenses alleged to have been incurred in the course of this litigation up to the present time. The major portion of these costs and expenses were alleged to have been incurred for stenographic services. The balance includes telephone, telegraph, and printing expenses, and travel, hotels, meals, and miscellaneous expense incurred by the movants' attorneys.

6. The movants also requested an allowance of attorneys' fees, likewise payable out of the above described fund, to attorneys for Mallonee et al.

(shareholder plaintiffs), for the Long Beach Federal Savings and Loan Association, and for the Title Service Company. Allowances were requested for services in this litigation up to approximately March 6, 1947, and the right to request allowances for subsequent services was expressly reserved. The request was for allowances in reasonable amounts to bet set by the District Court. Affidavits by two members of the California bar were filed which respectively valued the attorneys' services at $125,000 and $115,000.

7. A hearing was held on these motions before District Judge Peirson M. Hall, on April 7, 1947, at which petitioner Ammann (one of the appellants in No. 687) strongly resisted the granting of such motions in whole or in part, and urged that the District Court was without power to grant said motions, both because of the stay issued by Mr. Justice Rutledge and continued in force by the Court, and because the case is now pending on appeal in this Court. Petitioner Fahey (the other appellant in No. 687) did not appear at said hearing, since it is his contention that the lower court has no jurisdiction of his person.

8. After hearing, Judge Hall granted the motion with respect to costs and expenses, and also with respect to counsel fees for Messrs. Westover and Smith, Counsel for the shareholder plaintiffs. On April 7, District Judge Hall orally directed

739319—47——2

Messrs. Westover and Smith to prepare a judgment, in accordance with his opinion delivered in open court, ordering the Clerk of the District Court to pay to the appropriate parties, out of the fund in the court's registry, the sum of $17,295.13 to cover costs and expenses, and the sum of $50,000.00 as an allowance for counsel fees to Messrs. Westover and Smith. Petitioners are unable to state whether or not said judgment has as yet been entered.

9. In the normal course of his duties the Clerk of the District Court will, unless restrained, or unless execution of said judgment is further stayed, pursuant to Judge Hall's order and judgment issue his checks for the aforesaid sums, immediately at the close of the ten-day automatic stay of execution provided by Rule 62 (a) of the Federal Rules of Civil Procedure.

II

10. Petitioners submit that, by reason of the pendency of the appeal in No. 687 and of the stay of execution confirmed by this Court, the District Court was and is without jurisdiction and power to order any of the aforesaid funds in the registry of the District Court to be paid out for the purposes and as provided in the District Judge's direction of April 7, 1947. The execution of said order and judgment would violate the terms of this Court's order staying the judgment below, and would deprive this Court of effective juris-

diction over the portion of the fund paid out pursuant to the lower court's command.

11. This Court's stay order deprived the District Court of jurisdiction to enter the instant order. The judgment of the three-judge District Court, now on appeal to this Court in No. 687, provided that neither petitioner herein, individually or in his representative capacity, has any right, title, interest, or claim to the properties interpleaded and deposited in the registry of the District Court (Record in No. 687, p. 499). The decree also enjoins petitioners, individually and in their representative capacities, from ever asserting any right, title, or interest in these funds (Record in No. 687, p. 499). The decree further reserved to the District Court, "the right to make such other and further orders herein as shall hereafter be necessary to determine collateral issues hereto and to give this decree full force and effect" (Record in No. 687, pp. 499–500). The stay granted by Mr. Justice Rutledge on October 1, 1946, and confirmed by the Court on December 9, 1946, stayed the execution and enforcement of the *entire decree* entered by the District Court (except to the extent that the decree restrains a merger, consolidation, or commingling of the Association, or its assets, with any other association). This Court's order therefore necessarily stayed the execution and enforcement of (a) the District Court's determination that petitioners have no claim to the fund and also of (b) that por-

tion of the decree reserving to the District Court the "right to make such other and further orders herein as shall hereafter be necessary to determine collateral issues hereto and to give to this Decree full force and effect." The District Court's judgment in question, must, however, rest on both of these provisions of the superseded decree, and, accordingly, that court was deprived by the stay order of all jurisdiction to enter such a judgment. It is elementary that once a stay has been granted by this Court, the lower court is without power to execute or enforce its decree in any way. *Stockton* v. *Bishop,* 43 U. S. 74; *Draper* v. *Davis,* 103 U S. 370, 371; *Kayser* v. *Farr,* 105 U. S. 262, 266. The purpose of a stay is to maintain the subject of the action in status quo until the final determination of the appeal, so that appellants (petitioners herein) will not lose the fruits of a meritorious appeal.

12. Moreover, the pendency of the appeal in this Court itself deprives the District Court of power to make such an order disposing of funds involved in the litigation. If appellants' position in No. 687 is sustained by this Court, the entire action will have to be dismissed, and the sums in the District Court's registry forthwith turned over to the Association (acting through the Conservator). For the District Court otherwise to dispose of a portion of the fund, before this Court has determined the proper disposition of the funds, strikes at this Court's power to render its decision

effective by mandate. The established rule requires lower courts, having custody of a disputed fund, to preserve that fund pending appeal, and not to appropriate any part of it for any other purpose. In *Bronson* v. *La Crosse & Milwaukee R. R. Co.*, 1 Wall. 405, this Court said (p. 410):

> To guard against misconstruction in respect to the powers of a court having jurisdiction over the subject-matter, and where a decree has been rendered affecting the property in litigation—the road in this case—and an appeal is taken to this court, as the property in controversy is not brought into the appellant tribunal, but remains in the custody and care of the court below, it is agreed that *full power exists in that court, pending the appeal, to adopt all proper and judicious measures to protect and preserve it from waste or loss.* For this reason there can be no well-founded objection in the present case to the running of the road, and the reasonable application and expenditure of its revenues for that purpose. *Beyond this, any appropriation of the revenues is not warranted. They should be reserved for such disposition as may be directed by the final decree in the cause.* [Italics supplied.]

And in *Goddard* v. *Ordway*, 94 U. S. 672, this Court said (p. 673):

> While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any

decree that may be made here, for that would be to defeat our jurisdiction.

The case of *Dickinson* v. *Rinke,* 132 F. 2d 884, arising in the Second Circuit, well illustrates the general rule that an appeal deprives the lower court of jurisdiction to act. That case pertained to the district court's jurisdiction to make an ancillary order while an appeal from the judgment dismissing the complaint was pending. The main action, which was one for discovery and accounting of shares of stock, was dismissed, but the lower court, after appeal taken, punished certain parties by contempt proceedings for removing a large portion of the disputed shares from the court's jurisdiction. The Circuit Court of Appeals held that this order was "void because it was entered while the District Court had no jurisdiction of the proceedings." The court said (p. 885):

> The order imposing the fines, from which the appeal has been taken, was clearly an ancillary order in the main action brought by Dickinson, entered to compensate the latter for expenses incurred through the removal of the 244,041 shares of stock from the Southern District. Before it was entered, the appeal from the judgment dismissing the complaint had been perfected. * * * Here, after an appeal was taken from a final judgment in the suit, the District Court held further hearings and sought to exercise its discretion in an ancillary

> matter as to which it had deliberately reserved judgment pending the determination of the merits in the main action. Such a practice would entail serious inconvenience in splitting up for purposes of appeal matters which should come up on a single record. Because an appeal had been taken in the main action, the District Court was without jurisdiction to enter the order of August 25, 1942.

In that case, the jurisdiction of the lower court was denied even though, unlike the instant case, judgment on the particular ancillary matter had been expressly reserved, and property in the hands of the court was not involved.

13. It is established beyond contradiction that in a derivative shareholders' suit, such as this, attorneys' fees are allowable only if the corporation or association has benefited from the action, and these are not allowable, *unless and until the plaintiffs have been finally successful in their action.* Ultimate failure in the action precludes any allowance of counsel fees. *Hobbs* v. *McLean,* 117 U. S. 567, 582; *Sprague* v. *Ticonic National Bank,* 307 U. S. 161; *Trustees* v. *Greenough,* 105 U. S. 527, 534; *McCourt* v. *Singers-Bigger,* 145 Fed. 103, 114 (C. C. A. 8); *Winslow* v. *Harold G. Ferguson, Corp.,* 25 Cal. 2d 274, 276; *McArthur* v. *The John McArthur Co.,* 39 Cal. App. 704, 705; 13 Fletcher, Cyclopedia of the Law of Private Corporations (1943 ed.), Sec. 6045, pp. 453, 456, 458, 459; 49 A. L. R. 1150–1151, 1190, 1166; 107

A. L. R. 750, and cases cited; 14 Am. Jur. p. 47. But before the conclusion of this litigation, including the determination of the appeal in No. 687, it cannot be said that the plaintiffs have succeeded, or that the Long Beach Federal Savings and Loan Association has secured any advantage or gain from the suit. On the contrary, if petitioners (appellants in No. 687) are successful, it will clearly appear that the litigation has not been advantageous for the Association, which will have gained nothing, and lost much, from the entire action. Reliance cannot be placed in the judgment of the three-judge District Court to prove that the suit has benefited the Association, since that judgment has been stayed in its entirety.

The cases in which payments are allowed out of a fund before the close of the litigation are those in which a trust fund is being administered in court (such as a bankruptcy estate, an estate of a decedent or an estate over which the court takes jurisdiction by virtue of a creditor's bill) and expenses of administration are allowed during the course of administration. Here, allowances are sought from the fund, not for the purpose of administering it, but for the wholly separate purpose of carrying on the main litigation and compensating the attorneys who have carried it on. For such allowances, appellees and their counsel must wait at least until they have finally succeeded in ousting the Conservator.

14. However, it may be doubted whether attorneys' fees can be allowed out of the funds in

the registry of the District Court, even if appellees are ultimately successful, since their efforts neither recovered the fund for the benefit of the Association nor preserved it from dissipation. Cf. *Hauerstein* v. *Lynham,* 100 U. S. 483, 491: "It is a settled rule in this Court never to allow counsel on either side to be paid out of the fund in dispute." There never has been any doubt that the Association (whether acting through its board of directors, or through the Conservator) is entitled to the whole fund, and the Conservator has not been attempting to dissipate it. Thus, no funds in the hands of the District Court have been recovered or preserved through the efforts of the appellees or their attorneys, but, on the contrary, if their efforts caused the payment into the court of the sum of approximately $850,000 as they contend, instead of aiding the shareholders of said Association, the appellees have injured them to the extent that the fund thus paid into court bears no interest and produces nothing for the Association or for its shareholders. This unnecessarily sterilized fund was created by the adamant position of the Title Service Company which, ignoring the fact that third parties are protected in dealing with *de facto* officers, even though the Act should subsequently be held unconstitutional (and now ignoring the fact that the Conservator is maintained in office by order of this Court), has tied upon and continues to tie up the property of the Association by depositing trust

deeds in court and filing *lis pendens.* This has compelled mortgagors to pay funds into court to obtain releases. The Association was thus unnecessarily deprived of the use of these funds or the interest thereon pending this litigation.

III

15. For the reasons stated above, the order and judgment allowing costs and counsel fees, if entered and allowed to stand, will prevent this Court from fully exercising its appellate jurisdiction. Since that order and judgment would seriously interfere with the appellate jurisdiction of this Court, in deciding No. 687, petitioners invoke the power of this Court, under Sections 262 and 234 of the Judicial Code to issue a writ of mandamus and/or prohibition and/or injunction to the said District Judge and the Clerk and other officers of the District Court, requiring the said Judge not to enter said judgment, or if it has already been entered, to withdraw said judgment, and ordering the Clerk and other officers not to pay any funds pursuant thereto.

16. This Court undoubtedly has power to protect its appellate jurisdiction in No. 687 by the issuance of such a writ, as an incident to the pending appeal. *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 272–274; *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 24–26; *Ex parte United States,* 319 U. S. 730; *Ex parte Republic of Peru,* 318 U. S. 578, 582–585; *In re National Labor Relations Board,* 304 U. S. 486.

17. No other timely relief is available to petitioners. The argument in No. 687 is set for the session of April 28, and normal processes of appeal, if they are available at all, cannot bring the matter to this Court in time for decision concurrently with the determination of the main case.

Wherefore, petitioners respectfully pray:

1. That a writ of mandamus issue from this Court directing and commanding the Honorable Peirson M. Hall, Judge of the District Court of the United States for the Southern District of California, and the Clerk and other officers of said court to vacate the order and judgment awarding costs, expenses, and an allowance for counsel fees to certain of the appellees in No. 687, and their attorneys, if such order and judgment has been entered, and not to enter such an order and judgment, if it has not already been entered.

2. That a writ of prohibition issue from this Court to the said Honorable Peirson M. Hall, Judge of the District Court of the United States for the Southern District of California, and the Clerk and other officers of said court, prohibiting him and them from entering, enforcing or executing any said order and judgment awarding or allowing costs, expenses, and counsel fees.

3. That a writ of injunction issue from this Court to the Clerk and other officers of the District Court of the United States for the Southern

District of California, enjoining him or them from paying out of the registry of said court any funds pursuant to any such order and judgment awarding or allowing costs, expenses, and counsel fees.

4. That this Court grant to petitioners herein such other and further relief as may be just and proper in the premises.

GEORGE T. WASHINGTON,
Acting Solicitor General.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Robert L. Stern, being duly sworn deposes and says: I am a Special Assistant to the Attorney General in the Office of the Solicitor General, and as such am immediately responsible for the conduct of the litigation referred to in the foregoing petition. I have read the foregoing petition and know the contents thereof, and I am familiar with the proceedings in the District Court of the United States for the Southern District of California and in this Court to which reference is made in said petition. The statements of fact contained in the foregoing petition are true to the best of my knowledge, information, and belief.

ROBERT L. STERN.

Sworn to before me this 11th day of April 1947.

[SEAL] W. MARVIN SMITH,
Notary Public, D. C.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 26 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1947.
No. 133 Miscellaneous

EX PARTE JOHN H. FAHEY and A. V. AMMANN, Individually and Respectively as FEDERAL HOME LOAN BANK COMMISSIONER and CONSERVATOR for THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION.

In the Matter of the Petition of JOHN H. FAHEY and A. V. AMMANN, Individually and Respectively as FEDERAL HOME LOAN BANK COMMISSIONER and COMMISSIONER and CONSERVATOR for THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioners,

For a Writ of Manadamus and/or Prohibition and/or Injunction

against

THE HONORABLE PEIRSON M. HALL, Judge of the District Court of the United States for the Southern District of California, and the Clerk and other officers of said Court.

RETURN TO RULE TO SHOW CAUSE. POINTS AND AUTHORITIES AND APPENDIX.

PEIRSON M. HALL,
Respondent Judge.

(Continued on Inside Cover)

Attorneys for real parties in interest:

WYCKOFF WEEKOVER,
Attorney for Shareholders Protective Committee,
Movants—Plaintiffs Below.

CHARLES K. CHAPMAN,
Attorney for Long Beach Federal Savings
and Loan Association,
Movant—Defendant Below.

HARRY O. WALLACE,
Attorney for Title Service Company,
Movant—Defendant Below.

SUBJECT INDEX

PAGE

Return to rule to show cause of respondent..... 1

Points and authorities..... 11

I.

Did the appeal deprive the District Court of all jurisdiction? 12

II.

A. Did the stay of execution deprive the District Court of all jurisdiction? 16

B. The next question is whether or not the order of allowance of fees and expenses was in aid or furtherance of the "execution or enforcement" of the stayed decree of the three-judge court..... 17

C. It is next contended by the petitioners Fahey and Ammann (paragraph 11 of Petition), that the three-judge decree having provided that the petitioners Ammann and Fahey have no claim to the funds on deposit in the court, the stay precluded the respondent District Judge from making any determination of the application for reimbursement of expenses and allowances, and that the District Court's reimbursement of expenses and fees on account was a determination that petitioners Fahey and Ammann have no interest in the fund contrary to the stay.... 19

III.

There being no stay in effect preventing the District Court from hearing the petition or preventing the District Court from exercising its jurisdiction for an allowance of fees, the remedy open to any complaining party is by appeal, and not to secure review by the extraordinary remedies of prohibition or mandamus. Any judgment of the respondent District Court making an allowance of fees is severable under Section 54(b), F. R. C. P., and is an appealable order under it and under Section 792, Title 28, U. S. C.... 20

PAGE

IV.

Any action of the respondent District Court making order allowing fees and expenses is an appealable judgment..... 20

V.

It is not necessary that a suit be successful in order to permit the allowance of fees by a court of equity..... 21

VI.

Nor is it necessary that the litigation be finally concluded before a court of equity has power to make allowance for the expenses or the attorneys' fees..... 21

VII.

A federal court, in litigation not based upon a federal statute as such, should follow the law as declared of a state, whether it be declared by legislative enactment or by decision..... 22

VIII.

Petitioners' claim 22

IX.

The petitioners' cases are not in point..... 26

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bronson v. La Crosse & Milwaukee R. R. Co., 1 Wall. 405	27
Buford v. Tobacco Growers' Coop. Assn., 42 F. (2d) 791	31
Canter v. American Insurance Co., 3 Peters 307	21
Colley v. Wolcott, 187 Fed. 595	21
Commercial Trust Co. v. Mason, 119 N. J. Eq. 376	31
Cowdry v. Galveston, 93 U. S. 352	21
Detective Comics, Inc. v. Bruns Publications, Inc., 28 F. Supp. 399	21
Dickinson v. Rinke, 132 F. (2d) 884	27
Draper v. Davis, 102 U. S. 370	26
Eggert v. Pacific States Savings & Loan Assn., 53 Cal. App. (2d) 552	21, 22
Goddard v. Ordway, 94 U. S. 672	27
Guaranty Trust Co. v. York, 326 U. S. 99	22
Hobbs v. McLean, 117 U. S. 567	27
Kayser v. Fair, 105 U. S. 265	26
McArthur v. The John McArthur Co., 39 Cal. App. 704	30
McCourt v. Singers-Bigger, 145 Fed. 103	29
New York Dock Co. v. Poznan, 274 U. S. 117	21
Peru, Ex parte, 318 U. S. 578	20
Ruby Lee Minar, Inc. v. Hammett, 53 F. (2d) 149	21
Sprague v. Ticonic Bank, 307 U. S. 161	18, 19, 20, 21, 29, 30
Stockton v. Bishop, 43 U. S. 74	26
Trustees v. Greenough, 105 U. S. 527	20, 21, 28, 29, 30, 31
Warren v. Palmer, 310 U. S. 132	21
Winslow v. Harold T. Ferguson Corp., 25 Cal. (2d) 274	20, 21, 30

STATUTES	
California Statutes (1937), Chap. 784	4
Federal Rules of Civil Procedure, Rule 1	12
Federal Rules of Civil Procedure, Rule 54	26
Federal Rules of Civil Procedure, Rule 54(b)	18
Federal Rules of Civil Procedure, Rule 62	12, 13
Federal Rules of Civil Procedure, Rule 62(a)	14

PAGE

Federal Rules of Civil Procedure, Rule 62(c) 12, 13, 14, 15
Federal Rules of Civil Procedure, Rule 62(d) 15
Federal Rules of Civil Procedure, Rule 62(e) 13, 14, 15
Federal Rules of Civil Procedure, Rule 62(g) 15
Rules of the Supreme Court, Rule 36 12

TEXTBOOKS

14 American Jurisprudence, p. 47 31
107 American Law Reports, pp. 726, 735, 743 21
107 American Law Reports, p. 750 31
8 Cyclopedia of Federal Procedure (2d Ed.), Sec. 3666, p. 490 21
13 Fletcher, Cyclopedia of the Law of Private Corporations 29

SUBJECT INDEX TO APPENDIX

PAGE OF APPENDIX

Ruling of the Court, directing entry of minute order, announced April 7, 1947 3
Minute order, dated April 7, 1947 11
Plaintiffs' proposed findings of fact and order for interim partial allowance on account of expenses and attorneys' fees incurred by plaintiffs, the Shareholder Members Protective Committee, prior to March 1, 1947 15
Affidavit of mailing of plaintiffs' proposed findings of fact and order for interim partial allowance on account of expenses and attorneys' fees incurred by plaintiffs, the Shareholder Members Protective Committee, prior to March 1, 1947 21
Reporter's transcript of proceedings, dated April 7, 1947 23
Reply of Long Beach Federal Savings and Loan Association to motions and supplemental points and authorities in support of resistance to motions 83
Reply of Title Service Company to resistance to motions and supplemental points and authorities in support of resistance to motions 103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 133 Miscellaneous.

EX PARTE JOHN H. FAHEY and A. V. AMMANN, Individually and Respectively as FEDERAL HOME LOAN BANK COMMISSIONER and CONSERVATOR for the LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION.

In the Matter of the Petition of JOHN H. FAHEY and A. V. AMMANN, Individually and Respectively as FEDERAL HOME LOAN BANK COMMISSIONER and CONSERVATOR for the LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioners.

For a Writ of Mandamus and/or Prohibition and/or Injunction

against

The HONORABLE PEIRSON M. HALL, Judge of the District Court of the United States for the Southern District of California, and the Clerk and other officers of said Court.

RETURN TO RULE TO SHOW CAUSE OF RESPONDENT.

Comes now the respondent Peirson M. Hall as Judge of the United States District Court of the Southern District of California, Central Division, in the above en-

titled matter and obedient to the rule of the said Honorable Court, for good cause, shows as follows:

1. That the petitions of John H. Fahey and A. V. Ammann filed April 11, 1947 in the United States Supreme Court for Writs of Mandamus and/or Prohibition and/or Injunction fail to correctly set forth the record of the proceedings before respondent on April 7, 1947, in that the ruling of respondent from the bench as well as other pleadings, transcripts, rulings, and other parts of the record have been omitted by petitioners which respondent believes necessary to a complete understanding of the matter. Said omitted parts of the record are attached hereto as an appendix, to-wit:

	PAGES
a. Ruling of the Court announced April 7, 1947 directing entry of minute order	3- 10
b. Minute order, dated April 7, 1947	11- 14
c. Plaintiffs' proposed Findings of Fact and Order for Interim Partial Allowance on Account of Expenses and Attorneys' Fees Incurred by Plaintiffs, the Shareholder Members Protective Committee, prior to March 1, 1947 (Affidavit of mailing showing service attached.) Note: The name Peirson M. Hall, Judge of the District Court was typed on the original (p. 20) ready for, but was not signed by respondent.	15- 20
d. Reporter's transcript of proceedings held April 7, 1947	23- 81
e. Reply of Long Beach Federal Savings and Loan Association to the motions and points and authorities of the resistors	82-101

f. Reply of Title Service Company to motions and supplemental points and authorities of the resistors 102-116

2. That as indicated by respondent's statement and ruling from the bench on April 7, 1947, and the minute order, respondent has not taken and did not and is not threatening to take any action looking to the allowance of any expenses or fees as asked in the motions of said Association and its counsel, or of said Title Service Company and its counsel, but made an allowance only for expenses of said Shareholders' Committee, and the sum of fifty thousand dollars ($50,000.00) fees on account to Westover & Smith, as attorneys for said shareholders' committee.

3. That since the hearing of said matter on April 7, 1947, on the petitions for attorneys' fees and expenses, your respondent has taken no further action in, or in connection with, the said matter or anything in relation thereto.

4. Respondent makes no reply to the allegations of fact contained in said petition for the following reasons:

In so far as said facts are supported or denied by the record now before the Honorable United States Supreme Court, all such facts of record speak for themselves;

As to any other matters of fact alleged in said petition, respondent neither admits, nor affirms, nor denies the same, as respondent may be called upon in subsequent hearings before him as a judge of the United States District Court to determine their truth or falsity.

5. That pursuant to the order of respondent at said hearing on April 7, 1947, the plaintiffs prepared and sub-

mitted Plaintiffs' Proposed Findings of Fact ond Order (Appendix, pp. 15-20) which were delivered to the clerk of the District Court of California, Central Division, on April 12, 1947, but were not brought to the attention of this respondent until after respondent had been informally advised that application was being made *ex parte* by the petitioners John H. Fahey and A. V. Ammann for leave to file in the Supreme Court of the United States their petition for a "Writ of Mandamus and/or Prohibition and/or Injunction."

That this respondent did not sign the plaintiffs' proposed findings of fact and order for the further reason that in the opinion and judgment of respondent as a judge of the United States District Court, certain additional and other facts than those which are set forth in said proposed findings of fact and order appeared at the time your respondent directed the making of said minute order on April 7, 1947, and now appear, to be true and should be set forth in the findings of fact and order to enable any appellate or reviewing court to know the factual basis of such order.

Said additional facts are as follows:

(a) The plaintiffs herein, the Shareholder Members Protective Committee are duly and regularly licensed and authorized to transact and carry on business as such in the state of California, by virtue of license No. L. A. A37621, file No. 80282 L. A. issued pursuant to Chapter 784, Statutes of 1937 of the State of California, and duly renewed on the 2nd day of January, 1947, by the Department of Investments, Division of Corporations, of the State of California.

(b) The filing and prosecution of the suit herein did protect and preserve the association and its assets and funds, in that it prevented the defendants or some of them from dissipating and breaking up the Long Beach Federal Savings and Loan Association, its membership shares and organization, by merging, consolidating, reorganizing or uniting said association, or commingling said association's assets, membership shares, or members with other organizations, banks, corporations, associations, or institutions, which would thereby have caused an immediate and irreparable loss and damage to the plaintiffs and other shareholder members of the Long Beach Federal Savings and Loan Association, as found by the respondent from the factual showing made before him on May 27, 1946, in a restraining order issued on said date.

That the terms of said restraining order have, ever since the 27th day of May, 1946, continued in full force and effect, and have become a portion of the decree of the three-judge statutory court, made on September 30, 1946, which portion of said decree was not stayed in the stay order issued by the Honorable Justice Wylie Rutledge, Associate Justice of the United States Supreme Court, on October 1, 1946, which stay is still in full force and effect and has not been modified, amended or enlarged in any particulars.

(c) That in the six days from the date of seizure on May 20, 1946 of the said association property by the appellant Ammann and the filing of the within suit on May 26, 1946, the run of withdrawals of money by shareholder members was approaching a panic and resulted in the withdrawals of approximately six million dollars ($6,000,000.00) or at the rate of approximately one mil-

lion dollars ($1,000,000.00) a business day. That the filing of the within action on the 27th day of May preserved the assets of said association by changing the trend of withdrawals so that in the period of approximately the next seven weeks withdrawals amounted to only two million dollars ($2,000,000.00) or at the rate of only approximately forty-eight thousand dollars ($48,000.00) per business day; that had said trend of withdrawals not been changed, said association would have been nearly or completely destroyed by the withdrawal of all or substantially all of its shareholder member accounts, which withdrawals would have dissipated and destroyed the assets and business of said association; that the filing and prosecution of the within action by said counsel for the shareholder members committee thereby preserved, maintained and saved said association and its assets remaining after the withdrawal for its remaining shareholder members.

(d) That by long established custom and usage in real estate transactions in Southern California, and particularly in the county of Los Angeles, State of California, titles are not accepable to purchasers, nor can real property be encumbered in regular channels, except upon the issuance of a policy of title insurance by a dependable, established title insurance company licensed under the laws of the State of California.

That loans upon real property in the State of California are not ordinarily secured by mortgages, but instead, trust deeds are used almost exclusively, by which the fee title to the property encumbered is deeded to a third party, usually a corporation, which acts as trustee with the power of foreclosure, and which trustee, upon the

payment of the indebtedness, must execute a deed of reconveyance upon the request of the payee in the note, which payee is referred to as the beneficiary in the deed of trust.

That said association had loans on approximately eight thousand (8,000) parcels of land in the face amount of approximately twelve million dollars ($12,000,000.00) of unpaid balances.

That the Trustee holding fee title to all of said parcels of property was and is Title Service Company, defendant, and cross-claimant in interpleader.

That at all times after the seizure by said Ammann of the property and records of said Association on May 20, 1946, the officials of said association, and the said Title Service Company refused to recognize the validity of said seizure, as a result of which a controversy developed between said Ammann, said Association and said Title Service Company, as to whether or not, after payment by the debtor, a reconveyance of the fee title should be made by said Title Service Company, as such trustee, upon demand of said Ammann, or on demand of said Association. That as a result of said controversy, the respondent District Court has allowed petitions in intervention by borrowers on notes secured by trust deeds, in order to enable them to secure merchantable titles to the property, and to thus avoid demands upon them for double payment of said notes and to avoid the costs and delay of foreclosures.

That by the maintenance of the within suit, the plaintiffs herein and their counsel have provided a means and inducement for all of the persons having loans from said association to pay said loans and secure valid reconvey-

ances, and also to secure policies of title insurance, which were otherwise not obtainable and without which they would have had no merchantable title to their property.

(e) The value of the services of the firm of attorneys Westover & Smith and their associates, in representing the plaintiffs the Shareholder Members Protective Committee up to March 1, 1947, in their endeavor to protect and preserve the said Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately sixteen thousand (16,000) shareholder members, is substantially in excess of the sum of fifty thousand dollars ($50,000.00).

(f) That an interim allowance on account of such attorneys' fees and a partial satisfaction thereof can be made at this time without endangering the solvency of the said association. That there is on deposit now in the registry of this court funds belonging to the Long Beach Federal Savings and Loan Association in excess of eight hundred thousand dollars ($800,000.00), from which an interim partial allowance on account of such attorneys' fees for services rendered prior to March 1, 1947 can be safely made. That a reasonable amount to be allowed at this time on account of and in partial satisfaction of such attorneys' fees is the sum of fifty thousand dollars ($50,000.00).

(g) That the plaintiffs, the Shareholder Members Protective Committee, have incurred extraordinary expenses in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets, and properties, which prior to March 1, 1946, amounted to fifteen thousand five hundred thirty and 29/100 dollars ($15,530.29) and that said plaintiffs, the

firm of Westover & Smith and their associate Daniel W. O'Donoghue, Jr., have expended the sum of one thousand five hundred thirty-four and 77/100 ($1,534.77) and two hundred thirty and 07/100 dollars ($230.07) respectively, for the protection and preservation of the Long Beach Federal Savings and Loan Association, and its assets and properties, and that they are entitled to reimburse therefor.

6. That neither the decree, to which the stay order issued by the Honorable Justice Wylie Rutledge was directed on October 1, 1946, nor the findings and conclusions of law in support thereof, anywhere made any reference to any award of any allowance for attorneys' fees or expenses incurred, on account, or otherwise, or at all.

7. That there has been no objection by said petitioners or any other party to the jurisdiction of respondent District Court at any time *since the issuance of the stay order,* although prior to the *issuance of the within writ,* respondent has from time to time allowed some twelve (12) interventions and deposits in Court, after motions duly served, and notices upon all parties. Said interventions have been allowed on behalf of borrowers who desired to pay off their indebtedness to enable them to secure clear title to their property.

There is now pending before respondent Court, seven (7) motions for leave to intervene, of which six (6) were duly noticed and set for hearing on April 21, 1947, which involve approximately one hundred and eighty-eight (188) parcels of property and the sum of approximately three hundred thousand dollars ($300,000.00) and which motions have been postponed by respondent for the reason that, if the Stay order of October 1, 1946, deprived

respondent Court of all jurisdiction, it deprived the Court of jurisdiction to hear and determine the said motions to intervene, to which motions said Ammann and Fahey have not objected.

8. The Memorandum of Points and Authorities of Law submitted by the parties prior to the hearing had upon April 7, are included in the record and now are presented to this Court.

9. That your respondent is a judicial officer of the United States of America and has no personal interest of any kind or character in this cause, and therefore has not deemed it necessary to employ counsel to represent him personally; that the real parties at interest in this matter were the movants in the District Court, to-wit, Paul Mallonee, C. H. Newhouse and Winnie Bucklin, as the Shareholder Members Protective Committee, plaintiffs, and the firm of Westover & Smith and their associate counsel as their attorneys; the Long Beach Federal Savings and Loan Association and its attorney, Charles K. Chapman, and the Title Service Company, and its attorneys, Thomas and Wallace, who have provided for the printing of this return and the supporting points and authorities, and assisted in the preparation of the latter.

Respondent suggests therefore that one or more of the foregoing enumerated real parties in interest be permitted to orally argue to said rule to show cause on its return to the Honorable Supreme Court, as if they were appearing as counsel for respondent.

Dater: At Los Angeles, California, April 24, 1947.

PEIRSON M. HALL,

Judge of the District Court, Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 133 MISCELLANEOUS.

EX PARTE JOHN H. FAHEY and A. V. AMMANN, Individually and Respectively as FEDERAL HOME LOAN BANK COMMISSIONER and CONSERVATOR for the LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION.

In the Matter of the Petition of JOHN H. FAHEY and A. V. AMMANN, Individually and Respectively as FEDERAL HOME LOAN BANK COMMISSIONER and CONSERVATOR for the LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioners,

For a Writ of Mandamus and/or Prohibition and/or Injunction,

against

The HONORABLE PEIRSON M. HALL, Judge of the District Court of the United States for the Southern District of California, and the Clerk and other officers of said Court.

POINTS AND AUTHORITIES

In Support of Return to the Rule to Show Cause In re Writ of Mandamus and/or Prohibition and/or Injunction.

I.

Did the Appeal Deprive the District Court of All Jurisdiction?

Obviously it did not, as the appellants first sought and were denied a general supersedeas by the three-judge court under F. R. C. P., Rule 62(c), and without taking an appeal or depending upon a general supersedeas, they sought and obtained from the Supreme Court a special stay order. For the same reason the *appeal* did not deprive the District Court of *any* jurisdiction. The extent of the stay is limited and determined by the terms of the stay order.

Since the adoption of the Federal Rules of Civil Procedure, effective September 16, 1938, they govern procedures in the district courts after stays in equity cases. The following are quoted:

> (Rule 1, F. R. C. P.)—"RULE 1, SCOPE OF RULES.—These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

There is nothing in Rule 36 of the Rules of the Supreme Court which conflicts with Rule 62 of the Federal Rules of Civil Procedure.

Rule 36, Supreme Court, provides in part:

> "36. APPEALS; BY WHOM; SUPERSEDEAS. . . . The Judge or justice allowing the appeal shall take the property security for costs and sign the requisite citation and he may also on taking the requisite secur-

ity therefor, grant a supersedeas and stay of execution or of other proceedings under the judgment or decree, pending such appeal.

"2. Supersedeas bonds must be taken, with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good."

Note: Agencies and officers of the United States Court are relieved from posting bond by Rule 62(e).

Rule 62 of Federal Rules of Civil Procedure provides in part:

"62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.—(a) AUTOMATIC STAY; EXCEPTIONS—INJUNCTIONS, RECEIVERSHIPS, AND PATENT ACCOUNTINGS. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal.

* * * * * * * * *

"62 (c) INJUNCTION PENDING APPEAL. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction,

the court in its discretion may suspend, modify restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

* * * * * * * * *

"62 (e) STAY IN FAVOR OF THE UNITED STATES OR AGENCY THEREOF. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant."

The order of stay issued by the Supreme Court is the only stay in this case as it is evident from the above there is no stay in effect under the rules.

(a) This being an injunction case, the latter portion of Rule 62 (a) specifically excepts the judgment from the provisions of Rule 62 (a), F. R. C. P. Such stay is governed by subdivision (c) of Rule 62, and, as the record will show, the three-judge statutory court joined in *denying* any stay [R. 502], so, there was no stay under subdivision (c) of Rule 62.

(b) Subdivision (d) of Rule 62 is not applicable, as the stay is granted thereunder only when a bond is given, and under subdivision (e) of Rule 62, the United States is not required to give bond. But subdivision (e) requires that the judgment be stayed, either under subdivision (c) by the district court, or three-judge statutory court, or under subdivision (g) by the appellate court, in this case the Supreme Court, in the event of an appeal by the government upon their request, if a stay is desired. *There is no automatic stay of execution on appeal by government officers.*

The extent of the stay therefore is determined exclusively by the terms of the stay order of October 1, 1946. It is significant that the terms of the stay order have never been enlarged upon.

The terms of the stay are as follows:

> "IT IS HEREBY ORDERED that the *execution and enforcement* of said decree be, and it hereby is, stayed (except to the extent that it restrains a merger, consolidation, or commingling of the Association or its assets with any other Association) pending the decision of the Supreme Court of the United States on the defendants' appeal and for a period of thirty (30) days thereafter, and that if the said directors have already taken possession of the said Long Beach Federal Savings and Loan Association, that the conservator, A. V. Ammann, be placed back in possession forthwith." (Emphasis added.)

II.

A. Did the Stay of Execution Deprive the District Court of All Jurisdiction?

Obviously not.

By its own terms the order of stay:

1. Stayed *only* the "execution and enforcement of the decree;" and

2. Excepted specifically that portion of the decree which prohibited and prevented the merger, consolidation and commingling of the Association or its assets with any other association.

In as much as the order stayed *only* the enforcement and execution of the decree, it did not, and does not stay things which are outside of, or are not in furtherance of the execution and enforcement of the decree.

If the allowance of attorneys' fees were a necessary incident to securing the order of restrain and prevention of merger and consolidation of the Association, then the order making an allowance of attorney fees and expenses for such purpose was within the exception and was not stayed. It needs little argument to support the proposition that it was necessary to file the original suit to get the order restraining the merger, and that it was necessary to hire lawyers and incur expenses to file and prosecute the suit, and that the same is true to defend the order on appeal which restrains any merger, consolidation or commingling of the Association or its assets. The trial court found

when issuing the original restraining order on May 27, 1946, that such an order of restraint was necessary to prevent a merger; such a finding was implicit in the three-judge decree making the restraint against merger (See opinion of three-judge court, 68 Fed. Supp. 418, p. 420, with reference to the merger of the $48,000,000 Los Angeles Bank with the $9,000,000 Portland Bank and the transfer of both to San Francisco without notice or hearing of any character), and the respondent District Judge has indicated in his response that the order of restraint preserved the association and its assets and was for the benefit of the shareholders and members of the association.

B. The Next Question Is Whether or Not the Order of Allowance of Fees and Expenses Was in Aid or Furtherance of the "Execution or Enforcement" of the Stayed Decree of the Three-Judge Court.

The decree of the three-judge court had no provision whatsoever concerning the allowance of attorney fees or the repayment of extraordinary expenses of litigation. Thus any order of allowance of reimbursement of expenses and attorneys' fees could not be in aid or furtherance of the execution and enforcement of the stayed decree. The petition for reimbursement and attorneys' fees is an independent proceeding and not a request for modification or enforcement or execution of the original decree.

Sprague v. Ticonic Bank, 307 U. S. 161, at 170 (1939).

If the Supreme Court reverses the three judge court in every particular, and issues its mandate directing the dismissal of the suit, and a petition for allowance of attorneys' fees and expenses were then filed before the mandate was spread, the respondent district court would have the jurisdiction and be under the duty to make a determination thereon, which would be subject to appeal under F. R. C. P. 54(b).

In *Sprague v. Ticonic Bank* (*supra*), the application for the allowance of counsel fees and litigation expenses, was made while the matter was still on appeal, and was denied by the District Court, on the ground that it "had no authority to grant the petition", because it "had no further function to perform other than to carry out the mandate of the Supreme Court when received." The Circuit Court of Appeals affirmed the District Court. But the Supreme Court in *Sprague v. Ticonic Bank* (*supra,* pp. 163, 164), reversed both low courts, holding that the

> "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts" (p. 164)

and that such situations called for

> individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility" (p. 167).

C. It Is Next Contended by the Petitioners Fahey and Ammann (Paragraph 11 of Petition), That the Three-Judge Decree Having Provided That the Petitioners Ammann and Fahey Have No Claim to the Funds on Deposit in the Court, the Stay Precluded the Respondent District Judge From Making Any Determination of the Application for Reimbursement of Expenses and Allowances, and That the District Court's Reimbursement of Expenses and Fees on Account Was a Determination That Petitioners Fahey and Ammann Have No Interest in the Fund Contrary to the Stay.

The answer to that lies in the fact that the petitioners Fahey and Ammann have never claimed any interest in the fund and have in fact, disclaimed any interest in the fund [Appendix p. 41], stating that the fund belonged to the shareholders. The most that the petitioners Ammann and Fahey could obtain in connection with the fund on deposit in court is the right to the possession thereof for the uses and purposes of the Association and the shareholders. Such a right of possession is not a right, title or interest or claim to title to any of the properties and inasmuch as a claim for reimbursement of expenses and attorneys' fees, as set forth in *Sprague v. Ticonic Bank, supra,* is an independent proceeding; any ultimate right of possession asked by Ammann and Fahey, in their representative capacities, would be subject to the payment of reasonable costs and attorney fees for the preservation of the fund.

III.

There Being No Stay in Effect Preventing the District Court From Hearing the Petition or Preventing the District Court From Exercising Its Jurisdiction for an Allowance of Fees, the Remedy Open to Any Complaining Party Is by Appeal, and Not to Secure Review by the Extraordinary Remedies of Prohibition or Manadamus. Any Judgment of the Respondent District Court Making an Allowance of Fees Is Severable Under Section 54(b) F. R. C. A. and Is an Appealable Order Under It and Under Section 792, Title 28 U. S. C.

It was stated in *Ex Parte Peru,* 318 U. S. 578 at 585 (1943), that:

> "Such power may be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this Court, should be taken."

IV.

Any Action of the Respondent District Court Making Order Allowing Fees and Expenses Is an Appealable Judgment.

Sprague v. Ticonic Bank, supra, 307 U. S. 161 (1939);

Trustees v. Greenough, 105 U. S. 527, 532 (1881);

Winslow v. Harold T. Ferguson Corp., 25 Cal. (2d) 274, 286 (1944).

V.

It Is Not Necessary That a Suit Be Successful in Order to Permit the Allowance of Fees by a Court of Equity.

Canter v. American Insurance Co., 3 Peters 307, 316 (1828);

Ruby Lee Minar, Inc. v. Hammett, 53 F. (2d) 149 (1931);

Eggert v. Pacific States Savings & Loan Assn., 53 Cal. App. (2d) 552 (1942).

In each of the foregoing cases, allowance of fees was made although the case was lost.

VI.

Nor Is It Necessary That the Litigation Be Finally Concluded Before a Court of Equity Has Power to Make Allowance for the Expenses or the Attorneys' Fees.

Winslow v. Ferguson, 25 Cal. (2d) 274, 278, 279 (1944);

Trustees v. Greenough, 105 U. S. 527, 538 (1881);

Warren v. Palmer, 310 U. S. 132, 139 (1940);

New York Dock Co. v. Poznan, 274 U. S. 117, 121 (.....);

Cowdry v. Galveston, 93 U. S. 352 (never brought to trial) (1876);

Colley v. Wolcott, 187 Fed. 595, 597 (1911);

Sprague v. Ticonic Bank, 307 U. S. 161 (1938) (see footnote 8, page 169);

8 Cyc. Fed. Proc. (2d) 490, Sec. 3666;

107 A. L. R. 726, 735 and 743;

Detective Comics, Inc. v. Bruns Publications, Inc., 28 F. Supp. 399, 402.

VII.

A Federal Court, in Litigation Not Based Upon a Federal Statute as Such, Should Follow the Law as Declared of a State, Whether It Be Declared by Legislative Enactment or by Decision.

Guaranty Trust Co. v. York, 326 U. S. 99 at 112 (1945).

While in the main case, the rights of the parties are dependent upon an interpretation of federal statute and the federal Consitution, the fact is that on the proceeding involving the allowance of attorney fees and extraordinary costs, no federal statute or federal right is involved and general equity principles should control.

The decision of the Supreme Court in *Guaranty Trust v. York,* 326 U. S. 99 (1945), is persuasive of the provisions that the rule of decisions applied by the highest courts of a state, in equity matters, as was done by the Supreme Court of the State of California in *Eggert v. Pacific States Savings and Loan Co.,* 53 Cal. App. (2d) 552 at 559, in denying rehearing should be the rule in the federal court sitting in the same state.

VIII.

Petitioners Claim.

Petitioners claim that:

> "It is elementary that once a stay has been granted by this Court, the lower court is without power to execute or enforce its decree in any way." (P. 7 of Petition.)

It is submitted a stay of execution stays only what it expressly states it stays (*supra*). It is the desire of the

respondent to fully comply with this, or any other, stay or order an appellate court may make.

The respondent endeavored to interpret the scope of the stay order in passing upon the applications. The court reporter quotes respondent at the time of hearing, in part as follows [Appendix pp. 3-6]:

> "The Court: As I indicated, I think that a stay order here prevails over the general rule of supersedeas, and that under the terms and provisions of the stay order the only thing that is stayed is the 'execution and enforcement of said decree.'
>
> "I cannot see how consideration and action upon the various motions and petitions here would effect the 'execution' or the 'enforcement' of the decree. As I indicated before, if this court has no power to consider this matter, then it has had no power to consider any of the petitions in intervention which involved title to real estate.
>
> "I do not think that the Justice of the Supreme Court, with none of the records and files in this case before him at the time the stay order was made, intended to so tie up the matter of the management of titles to property as would occur if the lower court's, that is, this court's, hands were entirely tied in connection with all matters and everything pending or concerned in the litigation.
>
> "There is nothing before me in these proceedings which looks to the 'execution' or 'enforcement' of the stayed decree.
>
> "It is significant that when a petition to set aside the stay order was presented and it was referred to the entire court, if they had intended the stay to be broader, that they did not at that time make it broader than it is.

"Moreover, it seems to me that even though I may be wrong in that respect, the exception which is specifically made in the stay order, that is, concerning the merger or consolidation of the association or commingling its assets with any other association, would permit this court to give consideration to and act upon an application for attorney's fees.

"This is an equitable proceeding and the court's power, as in all equitable proceedings, is broad and is not confined to the strict limits of precedent. In other words, the court in each equity case is bound to see if there is a precedent—and I find none here against the action in this case, and a great deal which would favor it—is nevertheless under the duty to act as a court of conscience, that is, to do what is right. It seems to me that it is right that the court should act here because, as I pointed out, the money that is involved in this litigation does not belong to the defendant Government officials, it belongs to the shareholders. It is their fund. The litigation is to preserve the fund for its rightful owner, and part of the litigation is to determine who is its rightful owner. It seems to me that it would be contrary to the course of equity and of good conscience to deny the allowance of any fees here because it would be in effect compelling judgment by default on the part of the stockholders' committee and those who are here seeking to prevent the validating of the seizure.

"What I am trying to say there is that it being their money, if this court would deny them the use of it, it would in effect say to those people whose money it is and who have some right at least in saying what shall be done with it and who shall manage it, 'Well,

you cannot litigate.' As I indicated, I think the proceedings are somewhat analogous to a divorce proceeding where interim allowances are made for fees and costs even though ultimate relief of any kind may be denied to the litigant.

"I am not satisfied at this time that I should make an allowance for three different sets of lawyers, however. I am satisfied that the shareholders' committee who initiated the litigation, who promptly sought compliance with the California law and secured a license from the Corporation Commissioner of the State of California, to act as a shareholders' committee, are entitled to an allowance on account and are entitled to an allowance of their costs up to March 1st, an allowance on account of fees up to March 1st, but not a total allowance of fees up to March 1st.

"In other words, I do not want to make an appraisal of the total value of their services which were rendered up to that date at this time. I think that if the time comes when the total value of their earnings should be appraised that perhaps it should be explored more by way of oral testimony and opportunity of cross-examination, which the resistor could have had here at this time if they chose to factually oppose this, but they chose not to do at this time.

"I am not satisfied that it would be right or legal for me at this time to make an allowance, either to the counsel for the association, or to the counsel to the Title Service Company, but in that connection I do not wish to be understood in saying that I have concluded finally that they are not entitled to any compensation. It would seem to me that ultimately they might be entitled to be compensated from the general fund. But at this stage of the proceedings I do not think that I would be justified in making an award to them either for their costs to date or on account of fees."

IX.

The Petitioners' Cases Are Not in Point.

A. The cases: *Stockton v. Bishop,* 43 U. S. 74 (1844); *Draper v. Davis,* 102 U. S. 370 (1880) and *Kayser v. Fair,* 105 U. S. 265 (1881), cited by the petitioners (Petition p. 7), involved writs of supersedeas and had to do with execution of the judgments appealed from (*Stockton v. Bishop*) or increasing the size of the supersedeas bond (*Draper v. Davis*), or requiring additional security for a supersedeas bond (*Kayser v. Fair*). None of these cases is concerned with administrative matters nor with issues not decided in the judgment appealed from. Certainly none was concerned with decisions on severable parts of litigation such as is now permitted under Rule 54 Federal Rules of Civil Procedure for District Courts adopted to be effective September 16, 1938.

It is submitted that these cases consider a supersedeas or general stay which does, broadly speaking, have the effect of divesting the lower court of further authority over the action. Nevertheless, the Court's attention is called to the fact that even in the event of a general stay, the lower court would still have power to enter orders for the preservation of the involved assets, which is, at least, one of the theories upon which was entered the order allowing expenses, including attorney's fees.

B. Petitioners' point 12 (Petition pp. 7-9) indicates a misunderstanding of the purport of respondent's proposed order. The order would not in any way be determinative of the ownership of the corpus of the fund. It is not a distribution of the fund to authorize the payment of a small portion of it to preserve the balance, any more than it is a destruction of a receivership estate to pay the re-

ceiver's fees and expenses or for the appellant Ammann to use Association funds for the protection of assets. Cases cited by petitioners are believed to support this position. It is stated in *Bronson v. La Crosse & Milwaukee R. R. Co.*, 1 Wall 405 (1863), at 410, as follows:

> ". . . full power exists in that court, pending the appeal, to adopt all proper and judicious measures to protect and preserve it from waste or loss."

and in *Goddard v. Ordway*, 94 U. S. 672 (1876) at 673:

> ". . . the court below may make the necessary orders to preserve the fund, . . ."

In *Dickinson v. Rinke*, 132 F. (2d) 884 (1943), the order of the district court was to impose the penalty for the crime before the question of guilt or innocence had been determined on appeal. Unlike the present case, it infringed on the jurisdiction of the upper court, and was a part of the action in chief.

C. It is argued by opposing counsel (Petition pp. 9-10 as Point 13) that "ultimate failure in the action precludes any allowance of counsel fees." The contention has been affirmatively answered herein at page 21. Here answer will be made only to point out that the cases cited are either not in point or hold to the contrary.

In *Hobbs v. McLean*, 117 U. S. 567 (1886), no such statement is made. The true basis for the court's decision is to be found in this court's own language at page 581 as follows:

> "Lastly, the defendant insists that the circuit court erred in not allowing his compensation for his services, expenses and attorneys' fees in recovering

> the fund in the Court of Claims from the United States. In reply to this contention, it is sufficient to say that the defendant rendered no services whatever in the recovery of the fund . . . we see no reason why they should pay the defendant, who, instead of aiding them in securing their rights, has been an obstacle and obstruction to their enforcement. The services for which the defendant seeks pay from the plaintiffs were not rendered in their behalf, but in hostility to their interest."

The court then expresses its approval of *Trustees v. Greenough* and distinguishes the facts at page 582.

In *Trustees v. Greenough,* 105 U. S. 527 (1881):

Another authority cited by opposing counsel under this point is the well-known case of *Trustees v. Greenough,* 105 U. S. 527, one of the leading authorities to the effect that the court has the power to allow expenses and fees pending the appeal of the main action. Opposing counsel have apparently cited this case under the assumption that *Trustees v. Greenough* holds a trial judge as being without authority to grant fees, because this court in that decision held the order granting attorneys' fees to be a final order. The significance of that finding has apparently been overlooked, for what the court was actually holding was that the order granting costs and fees was *not a part of the main action,* but was an independent matter not included in the judgment appealed from. The fact is clear from a reading of the case, that the trial judge was held to have the authority to allow costs and fees, while the litigation in chief was far from determined on appeal (p. 538).

In *Sprague v. Ticonic National Bank,* 307 U. S. 161 (1939), no statement is found as to the appropriate time for allowance of expenses and fees, but as *Trustees v. Greenough,* 105 U. S. 527 (1881), is cited with approval and as fees and expenses were there allowed prior to the completion of the litigation, the decision in *Sprague v. Ticonic Bank, supra,* may be taken as authority that expenses and fees may be allowed at any time in the court's discretion.

In the case of *McCourt v. Singers-Bigger,* 145 Fed. 103 (1906), it is not observed that the court laid down any requirements that the defendants would have to be finally successful in the action. The defendants had claimed an allowance and the circuit court in rejecting the claim based the decision thereon on the ground that the defendants

> "did nothing to recover or save a trust fund, or to prevent its waste or dissipation, but everything in their power to prevent its recovery or restitution to its original owner. Their proceedings, while in the name of the old company, which was made a defendant, were adversary to its equitable rights . . . we certainly shall not be the first to reward obstructionists out of a restored fund . . ." (p. 114).

Respondent would not have allowed expenses and fees to plaintiffs and their attorneys had he considered them to be obstructionists.

Petitioners have also cited 13 Fletcher Cyclopedia of the Law of Private Corporations. No statement is found that fees are not allowed until the plaintiffs have been finally successful in their action. We are here considering litigation by a representative group of the owners of a fund

and their attorney-client relationship thereto. The distinction the petitioners do not appear to observe is that the cases and authorities they cite are adversary actions, that is where one party opposes another, they cite cases to the effect that costs and attorney fees go to the party finally successful in that type of action. They do not appear to realize that there is an entirely separate line of authority stemming chiefly from *Trustees v. Greenough* and *Sprague v. Ticonic National Bank, supra,* solidly following the doctrine that fees and costs may be allowed for the defense of, or benefit to, the common fund. The present action falls within the scope of this latter doctrine. As between the plaintiffs and the fund there is no adversity.

In *Winslow v. Ferguson,* 25 Cal. (2d) 276 (1944), the holding is directly opposite to the contention of petitioners. There, on April 25, 1934 (p. 278) prior to the entry of the interlocutory judgment, March 5, 1940 (p. 278), plaintiffs were allowed and paid costs and attorney fees on account (pp. 278-279), and between the date of the interlocutory judgment (p. 278) and final judgment (not entered at time of opinion) an additional fee of $4,500 (p. 279) was allowed plaintiff's attorney.

McArthur v. The John McArthur Co., 39 Cal. App. 704 (1919), is distinguishable both because the court found the plaintiff had no cause of action (p. 705) and because it must be considered as being overruled by the later decision of *Winslow v. Ferguson, supra,* which was

decided at a later date by the highest court in the California judicial system.

In 107 A. L. R. 750, no such statement as that for which petitioners have cited it appears. In fact, the editors' note at page 753 cites *Buford v. Tobacco Growers' Coop. Assn.*, 42 F. (2d) 791 (1930), as requiring contribution to such fees, even from contesting members of the same class of litigants, and the opinion in *Commercial Trust Co. v. Mason,* 119 N. J. Eq., 376, states as follows:

> "Counsel fees of parties conducting litigation with a view of enriching the corpus of a trust estate should be paid out of the corpus."

No support for petitioners' statement is found in 14 *Am. Jur.* p. 47. *Trustees v. Greenough* (*supra*), is cited to the opposite effect (p. 48).

Petitioners argue (p. 10 of Petition) that if petitioners are successful in their present appeal (Supreme Court No. 687 this term) "it will clearly appear that the litigation has not been advantageous for the association, which will have gained nothing, and lost much, from the entire action."

Respondent does not agree with this statement. Many other issues will necessarily have to be disposed of if the decree of the three judges is reversed, including the legality of the acts of the petitioners even if under a valid statute, cross-claims in interpleader and interventions.

It is also stated by petitioners (p. 10 of Petition) that here "allowances are sought from the fund, not for the

purpose of administering it . . . etc." This is not a correct statement. The allowances were sought and granted for the purpose of administering the fund and not to carry on the main litigation. It was allowed because respondent was convinced the services contributed to the preservation of the common property and because the shareholder members of the association represented by the plaintiffs, the Shareholder Members Protective Committee, as a class, were admittedly the sole actual owners of the fund from which the allowance was sought to be made, that is, the allowance was from their own funds to be used by them in attempting to preserve their own property, seized and operated by one not of their own choosing.

D. It is argued by petitioners (pp. 10-11 of Petition) that the attorneys for plaintiff appellees have "neither recovered the fund for the benefit of the Association nor preserved it from dissipation." In the considered opinion of respondent considerable of the funds of the association have been preserved through the efforts of the appellees and their attorneys. It was on their motions that the order restraining the merger, consolidation, liquidation and commingling of the Association was made and it has been through their efforts that means have been found to make it possible for borrowers under loans secured by deeds of trust to pay off those loans and to obtain titles therefor.

E. Petitioners argue (p. 11 of their Petition) that if the order and judgment allowing costs and counsel fees is allowed to stand it will prevent this Court from fully

exercising its appellant jurisdiction. It is not believed that an administrative order allowing the undisputed owner of the fund in question to utilize approximately ¼ of 1% of it in endeavoring to preserve the corpus of the fund in any way constitutes an attempt to deprive the Supreme Court of its appellant jurisdiction. It is believed the situation is comparable to divorce, separate maintenance and equity receivership matters wherein interim costs and attorney fees may be allowed by courts in their discretion.

Respectfully submitted,

PEIRSON M. HALL,
Respondent Judge.

Attorneys for real parties in interest:

WYCKOFF WESTOVER,
Attorney for Shareholders Protective Committee,
Movants—Plaintiffs Below.

CHARLES K. CHAPMAN,
Attorney for Long Beach Federal Savings and Loan Association,
Movant—Defendant Below.

HARRY O. WALLACE,
Attorney for Title Service Company,
Movant—Defendant Below.

IN THE

Supreme Court of the United States

October Term, 1947.

No. 133 Miscellaneous

EX PARTE JOHN H. FAHEY and A. V. AMMANN, Individually and Respectively as FEDERAL HOME LOAN BANK COMMISSIONER and CONSERVATOR for THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION.

In the Matter of the Petition of JOHN H. FAHEY and A. V. AMMANN, Individually and Respectively as FEDERAL HOME LOAN BANK COMMISSIONER and COMMISSIONER and CONSERVATOR for THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioners,

For a Writ of Manadamus and/or Prohibition and/or Injunction

against

THE HONORABLE PEIRSON M. HALL, Judge of the District Court of the United States for the Southern District of California, and the Clerk and other officers of said Court.

APPENDIX.

SUBJECT INDEX TO APPENDIX

PAGE OF APPENDIX

Ruling of the Court, directing entry of minute order, announced April 7, 1947 3

Minute order, dated April 7, 1947 11

Plaintiffs' proposed findings of fact and order for interim partial allowance on account of expenses and attorneys' fees incurred by plaintiffs, the Shareholder Members Protective Committee, prior to March 1, 1947 15

Affidavit of mailing of plaintiffs' proposed findings of fact and order for interim partial allowance on account of expenses and attorneys' fees incurred by plaintiffs, the Shareholder Members Protective Committee, prior to March 1, 19[redacted] 21

Reporter's transcript of proceedings, dated April 7, 1947 23

Reply of Long Beach Federal Savings and Loan Association to motions and supplemental points and authorities in support of resistance to motions 83

Reply of Title Service Company to resistance to motions and supplemental points and authorities in support of resistance to motions 103

IN THE

District Court of the United States

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 5421-PH Civil

HONORABLE PEIRSON M. HALL, JUDGE PRESIDING.

PAUL MALLONEE, C. H. NEWHOUSE, and WINNIE BUCKLIN, etc.,

Plaintiffs,

JOHN H. FAHEY, individually, JOHN H. FAHEY as CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, etc., *et al.,*

Defendants.

RULING OF THE COURT.
Announced April 7, 1947.

The Court: As I indicated, I think that a stay order here prevails over the general rule of supersedeas, and that under the terms and provisions of the stay order the only thing that is stayed is the "execution and enforcement of said decree."

I cannot see how consideration and action upon the various motions and petitions here would affect the "execution" or the "enforcement" of the decree. As I indicated before, if this court has no power to consider this matter, then it has had no power to consider any of the petitions in intervention which involved title to real estate.

I do not think that the Justice of the Supreme Court, with none of the records and files in this case before him at the time the stay order was made, intended to so tie up the matter of the management of titles to property as would occur if the lower court's, that is, this court's, hands were entirely tied in connection with all matters and everything pending or concerned in the litigation.

There is nothing before me in these proceedings which looks to the "execution" or "enforcement" of the stayed decree.

It is significant that when a petition to set aside the stay order was presented and it was referred to the entire court, if they had intended the stay to be broader, that they did not at that time make it broader than it is.

Moreover, it seems to me that even though I may be wrong in that respect, the exception which is specifically made in the stay order, that is, concerning the merger or consolidation of the association or commingling its assets with any other association, would permit this court to give consideration to and act upon an application for attorney's fees.

This is an equitable proceeding and the court's power, as in all equitable proceedings, is broad and is not confined to the strict limits of precedent. In other words, the court in each equity case is bound to see if there is a precedent—and I find none here against the action in this case, and a great deal which would favor it—is nevertheless under the duty to act as a court of conscience, that is, to do what is right. It seems to me that it is right that the court should act here because, as I pointed out, the money that is involved in this litigation does not belong to the defendant Government officials, it belongs to the

shareholders. It is their fund. The litigation is to preserve the fund for its rightful owner, and part of the litigation is to determine who is its rightful owner. It seems to me that it would be contrary to the course of equity and of good conscience to deny the allowance of any fees here because it would be in effect compelling judgment by default on the part of the stockholders' committee and those who are here seeking to prevent the validating of the seizure.

What I am trying to say there is that it being their money, if this court would deny them the use of it, it would in effect say to those people whose money it is and who have some right at least in saying what shall be done with it and who shall manage it, "Well, you cannot litigate." As I indicated, I think the proceedings are somewhat analogous to a divorce proceeding where interim allowances are made for fees and costs even though ultimate relief of any kind may be denied to the litigant.

I am not satisfied at this time that I should make an allowance for three different sets of lawyers, however. I am satisfied that the shareholders' committee who initiated the litigation, who promptly sought compliance with the California law and secured a license from the Corporation Commissioner of the State of California, to act as a shareholders' committee, are entitled to an allowance on account and are entitled to an allowance of their costs up to March 1st, an allowance on account of fees up to March 1st, but not a total allowance of fees up to March 1st.

In other words, I do not want to make an appraisal of the total value of their services which were rendered up to that date at this time. I think that if the time comes when the total value of their earnings should be appraised

that perhaps it should be explored more by way of oral testimony and opportunity of cross-examination, which the resistor could have had here at this time if they chose to factually oppose this, but they chose not to do at this time.

I am not satisfied that it would be right or legal for me at this time to make an allowance, either to the counsel for the association, or to the counsel to the Title Service Company, but in that connection I do not wish to be understood as saying that I have concluded finally that they are not entitled to any compensation. It would seem to me that ultimately they might be entitled to be compensated from the general fund. But at this stage of the proceedings I do not think that I would be justified in making an award to them either for their costs to date or on account of fees.

According to the affidavits on file Mr. Daniel W. O'Donoghue, Jr. was retained by and rendered services to the shareholders' committee, although he consulted with the other counsel in that connection, so I would think that he would be entitled to his costs.

There is no contrary affidavit or evidence offered or permission requested to refute the total amount of costs expended to date by the shareholders' committee, which is $15,530.29, nor the shareholders' counsel, that is to say, Westover & Smith, of $1534.77, nor Mr. O'Donoghue of $230.07. So I will make an order allowing the repayment of those costs to March 1st as filed.

As indicated, I think that the counsel for the shareholders' committee should have an allowance on account. I have read with interest the affidavits of Justice Preston and of Mr. Martineau, both of whom have participated in litigation of similar size and consequence and responsi-

bility and who were both well equipped, in my opinion, to render an opinion as to the value of services.

Justice Preston fixes in his opinion the total value of the total services rendered to March 1st as $125,000, Mr. Martineau fixes the total value of the total services I believe at $115,000, and each of them gives his estimate of the proportion that shall be divided among the counsel.

I stated, however, that I do not wish to be understood as making any final decision concerning the final value of services to anyone, but I do believe that counsel of the firm of Westover & Smith should have an allowance on account in the sum of $50,000, and that will be the order of the court, deferring, however, the matter of any final judgment, that is, when I say final judgment I mean to say any judgment as to the total value of their fees. This is only partial and on account. Do I make myself clear?

Mr. Dougherty: Yes.

The Court: Until such future day as circumstances may make it convenient to decide, and reserving also any judgment whatsoever as to whether or not the counsel for the association itself or the counsel for the Title Service Company are or are not entitled to any compensation.

Is that clear to everybody?

Mr. Wallace: Your ruling amounts to a denial without prejudice?

The Court: No, I am not denying it. I am just reserving judgment upon your request and upon Mr. Chapman's request, both as to the reimbursement as to cost and payment of any fees.

Mr. Dougherty: May I inquire if your Honor has in view Rule 62, which gives an automatic stay of 10 days of this order and judgment?

I may say, your Honor please, that I think Rule 54 indicates that such an order is a judgment within the meaning of the rule.

The Court: I would think that it probably would be, as well as under Section 792, but I do not mean that it shall be a final judgment in the sense that that is the total amount that they should be allowed.

Mr. Dougherty: All I am interested in is whether or not we will have time without too much urgency in view of the telephone strike to make an attempt to have a review. I will assure you that it will be done with all promptitude possible.

The Court: I think there ought to be a written order on this matter.

Mr. Westover: I think there should be also.

Mr. Walker: I was somewhat concerned about the written order too, your Honor. Is the order to be directed to the Clerk to pay from the funds in his hands?

The Court: The order is to be directed to the Clerk to pay the money from funds now on deposit with the court.

I do not know whether I can or whether it will be necessary, but I would like to indicate that the money should ultimately be taken from the surplus, which is undenied, the $1,300,000 surplus. I do not know whether that can be done in this order or not.

Mr. Chapman: I think, your Honor, it can be.

Mr. Walker: Mathematically it will come from there in the last analysis anyhow.

The Court: I would think it would.

Mr. Westover: Assuming there is a surplus when we obtain it.

The Court: There was a surplus and that is undenied. On second thought I doubt if that ought to be a subject matter of the order. It would appear to me that the execution would be automatically stayed. In any event, it will take a day or so for them to get the order ready and to submit it to you for your approval as to form.

Mr. Walker. Your Honor, in reserving the ruling on the other two application for fees, are we to consider that as matter submitted to the court? It leaves it rather indefinite. I do not know just how to classify it.

The Court: I do not either, except that that is what I want to do. What is going through my mind in that connection at this moment is this—well, I do not know when the future or convenient date would be—but assume that the litigation should in the next year or so be able to be consummated and terminated. I think at that time there ought to be a general round-up of all matters undisposed of, such as this. Now it may be that in the meantime the parties will be able to demonstrate that allowances should be made to them in any event, but I would have to hear the matter over again at that time.

Mr. Walker: Then I wonder, would it be proper for the other two motions to go off calendar at this time?

The Court: Yes, I think perhaps that would be the better order of the court.

Mr. Walker: To be reset on order of the court.

The Court: The motions of Mr. Chapman and Mr. Wallace will go off calendar and there will be no other order made on them, to be reset upon notice or on the court's own motion. I think that would be better than attempting to make another order.

Is that all?

Mr. Westover: I take it, your Honor, that that can probably all be covered in one order, the entire matter off of calendar and so forth?

The Court: As to those that go off calendar, that is merely a minute order.

Mr. Westover: Very well.

The Court: There need be no written order in connection with them. It is a minute order. The order allowing the fee will be only in connection with your application and costs.

Mr. Westover: And an allowance made to Mr. O'Donoghue, our Washington representative. That is the one matter undisposed of in our application, your Honor.

The Court: I think you had better settled that with Mr. O'Donoghue. I did not indicate, but it seems to me that that is a matter between you and Mr. O'Donoghue.

Mr. Westover: Very well.

The Court: The order will provide that the money is payable to Westover & Smith, because Mr. O'Donoghue is working for you, so Westover & Smith can make out of that fund any interim allowance on account of Mr. O'Donoghue as shall be agreed upon between the parties. Otherwise all other matters will go off calendar, and we are recessed until 10:00 o'clock tomorrow morning.

MINUTE ORDER.

At a stated term, to wit: The February Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 7th day of April in the year of our Lord one thousand nine hundred and forty-seven.

Present:

The Honorable: Peirson M. Hall, District Judge.

Paul Mallonee, *et al.*, Plaintiffs, vs. John H. Fahey, *et al.*, Defendants. No. 5421-PH Civil.

This cause coming on for hearing on (1) motion of Title Service Company, a defendant and cross-claimant in interpleader herein, for allowance upon account of attorneys' fees and expenses, and payment thereof, pursuant to notice thereof filed March 6, 1947; (2) motion of the Long Beach Federal Savings & Loan Association, defendant, for allowance on account of fees for its attorney, pursuant to notice thereof filed March 6, 1947; and (3) motion of the plaintiff's for an interim order fixing, determining, allowing and ordering payment on account to the plaintiffs and to their attorneys for expenses and attorneys' fees incurred prior to March 1, 1947, pursuant to notice thereof filed March 6, 1947; Messrs. Westover and Smith by Wyckoff Westover, Esq., appearing as counsel for the plaintiffs; Messrs. Thomas & Wallace by H. O. Wallace, Esq., appearing as counsel for the Title Serv-

ice Company; Chas. K. Chapman, Esq., appearing as counsel for the Long Beach Federal Savings & Loan Association; Raymond Tremaine, Esq., appearing as counsel for Robert H. Wallis, defendant and cross-claimant; James M. Carter, U. S. Attorney, by Ronald Walker, Assistant U. S. Attorney, appearing as counsel for A. V. Ammann, individually and as Conservator for the Long Beach Federal Savings & Loan Association;

On motion of Attorney Walker it is ordered that Ray E. Dougherty, Esq., be admitted and associated as counsel for defendants herein, namely, A. V. Ammann, individually and as Conservator, and John H. Fahey, individually and as Commissioner.

Attorney Dougherty argues in opposition to motions for attorneys' fees. At 11:50 A. M. court recesses until 2:15 P. M.

At 2:20 P. M. court reconvenes and all being present as before, Attorneys Westover, Wallace, and Chapman, respectively, argue in support of the said motions. Attorney Dougherty replies.

The Court orders ruling on Motions (1) of Title Service Co., etc., and (2) of Long Beach Federal Savings & Loan Association, etc., deferred and stricken from the calendar to be restored either by the Court or the movants, reserving judgment until circumstances warrant a decision thereon, and that motion of plaintiffs, represented by the law firm of Westover and Smith be granted, and that the costs expended by the shareholders' committee in the amount of $15,530.29 be allowed, that the costs expended by Westover

and Smith in the amount of $1,534.77 be allowed, also the costs expended by Mr. Daniel W. Donoghue, Jr., heretofore retained by the Shareholders' Committee, in the amount of $230.07 be allowed, all to March 1, 1947.

The Court further orders that the counsel for the Shareholders' Committee be allowed $50,000.00, deferring final judgment as to the total value of their fees, this allowance being only partial and on account.

The Court orders that counsel for the Shareholders' Committee prepare form of order directing the Clerk to pay the money from funds now on deposit with the Court.

A true copy, attest, etc., Apr. 15, 1947.

(Seal) EDMUND L. SMITH,

Clerk U. S. District Court, Southern District of California,

By WM. E. COOK,

Deputy.

Deposited with Clerk April 12, 1947, and stamped: "Filed April 12, 1947. Edmund L. Smith, Clerk; by M. L. Gaines, Deputy Clerk."

In the District Court of the United States, in and for the Southern District of California, Central Division.

Paul Mallonee, C. H. Newhouse and Winnie Bucklin, Individually, and as Representatives of a Class, suing for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, an Association organized and existing under and by virtue of the laws of the United States of America, Plaintiffs, vs. John H. Fahey, Individually, John H. Fahey as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, Individually, and A. V. Ammann, as the purported Conservator for the Long Beach Federal Savings and Loan Association, The Long Beach Federal Savings and Loan Association, Title Service Company, sued herein as John Doe One (Cross-Claimant in Interpleader), R. H. Wallis, sued herein as John Doe Two (Cross-Claimant in Interpleader), *et al.*, Defendants.

"Sub Nominae."

Home Investment Company of Long Beach, a corporation, Intervenor, vs. Paul Mallonee, *et al.*, and John H. Fahey, *et al.*, Defendants in Intervention.

The Long Beach Federal Savings and Loan Association, Defendants and Third Party Plaintiffs, vs. Federal Home Loan Bank, *et al.*, Third Party Defendants.

Robert H. Wallis, Defendant and Third Party Plaintiff, vs. John H. Fahey, *et al.*, Third Party Defendants.

Title Service Company, a corporation, Defendant and Third Party Plaintiff, vs. John H. Fahey, *et al.*, Third Party Defendants. Civil File No. 5421 P. H.

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND ORDER FOR INTERIM PARTIAL ALLOWANCE ON ACCOUNT OF EXPENSES AND ATTORNEYS' FEES INCURRED BY PLAINTIFFS, THE SHAREHOLDER MEMBERS PROTECTIVE COMMITTEE, PRIOR TO MARCH 1, 1947.

Submitted pursuant to direction in the opinion of the Court announced April 7, 1947.

Federal Home Loan Bank of Los Angeles, etc., Third Party Defendant and Cross-Complainant, vs. Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, *et al.*, Third Party Cross-Defendant.

The motion of the plaintiffs, the Shareholder Members Committee, suing as representatives of the shareholder members of the Long Beach Federal Savings and Loan Association, for an interim allowance on account to reimburse the plaintiffs for their expenses and attorneys' fees incurred by them in their efforts for the protection and preservation of the funds and assets of the said association, from being merged, consolidated or commingled or otherwise lost or dissipated prior to March 1, 1947, having been previously filed with supporting exhibits and points and authorities by the plaintiffs on March 6, 1947, and this court having on said day made its order setting the 24th day of March, 1947, at the hour of 10:00 o'clock A. M. in Court Room No. 3, located in the Federal Building at Los Angeles, California, as the time and place for the hearing of said motion, and the court on March 6, 1947 made its order that notice of the filing of said motion and of the time and place of the hearing thereof should be given by the plaintiffs, the Shareholders Members Protective Committee, to all parties who have appeared in the action by service of a copy of said order

upon their respective solicitors or attorneys and that the Shareholders Members Protective Committee give public notice of the filing of said motion and of the time and place of the hearing thereof by publication of the said order of this court, on or before the 12th day of March, 1947, in the following newspapers of general circulation in the county of Los Angeles, State of California, to wit, (1) the Long Beach Independent, (2) The Long Beach Press Telegram, and (3) The Los Angeles Daily Journal;

And the notices of the time and place of the hearing of said motion and the publication of the said order fixing the time and place of the said hearing, having been duly given pursuant to said order and by publication as aforesaid of said order, thus giving notice to the shareholder members of the said Long Beach Federal Savings and Loan Association and affidavit of publication of said order having been filed and the plaintiffs having served and filed the affidavits of John W. Preston, former Justice of the California Supreme Court, and L. R. Martineau, Jr., Esquire, setting for their resepective expert opinions of the reasonable value of the services rendered by counsel for the plaintiffs and the matter having duly and regularly come on for hearing on the 24th day of March, 1947, at the hour of 10:00 o'clock A. M., and no person having appeared or filed any objection thereto, save and except the defendant A. V. Ammann, and the hearing of said motion having been duly and regularly continued upon the court's own motion to the 7th day of April, 1947, and the defendant A. V. Ammann having served and filed documents entitled "Resistance to Motions" and "Supplemental Points and Authorities in Support of Resistance to Motions," and the plaintiffs, the movants herein, having duly served and filed their Closing Statement and Points and

Authorities within the time allowed by the court, and the resistor, the defendant Ammann, having filed no counter affidavits denying or contravening the said affidavits or other factual documents filed by the plaintiffs, the matter came on regularly for hearing at 10:00 o'clock A. M. on the 7th day of April, 1947, and none of the shareholder members of the said Long Beach Federal Savings and Loan Association having appeared or made any objection thereto, and no other persons having made any objection to the granting of the said motion for an interim allowance on account of attorneys' fees and expenses, save and excepting only the resistor-defendants A. V. Ammann and John H. Fahey;

And there appearing Wyckoff Westover, Esquire, of the firm of Westover and Smith, attorneys for the plaintiffs; Ronald L. Walker, Esquire, Assistant United States Attorney, and Ray E. Dougherty, Esquire, Associate General Counsel of the Federal Home Loan Bank Administration, representing the resistor-defendants A. V. Ammann and John H. Fahey; Charles K. Chapman, Esquire, appearing for the defendant and cross-complainant Long Beach Federal Savings and Loan Association; H. O. Wallace, Esquire, of the firm of Thomas and Wallace, appearing for the defendant and cross-claimant in interpleader, Title Service Company, a corporation, and Raymond Tremaine, Esquire, appearing as attorney for the defendant and cross-claimant in interpleader, Robert H. Wallis;

And the Court having offered the opportunity to any and all persons and parties in the court room to present further or additional testimony or objection and there being none offered and the resistor-defendants A. V. Ammann and John H. Fahey having presented no contra-

vailing affidavits or oral or documentory evidence and the matter having been argued at length; the matter was submitted for decision.

The Court, being fully advised in the premises now finds: (1) that proper notice of the hearing of said motion has been duly and regularly given, both by service on counsel and by publication, and; (2) that the Court has jurisdiction of the persons and subject matter involved, and; (3) that no objections have been made by any of the shareholder members whose money and funds are here involved, and; (4) that no objection has been made by any other person or persons, excepting only, the resistor-defendants A. V. Ammann and John H. Fahey, and; (5) that the stay of execution issued October 2, 1946 by the Honorable Justice Wiley Rutledge of the United States Supreme Court operates only as a stay of the "execution and enforcement" of the decree of the statutory three judge court herein, and is not interpreted as depriving this court of its broad equity powers to consider and decide, any matters not contained in the decree so stayed, such as numerous interventions, supplemental interpleaders, this motion, and other administrative and collateral matters, and; (6) that the shareholder members represented by the plaintiffs the Shareholder Members Protective Committee are the actual owners of the funds and assets of the Long Beach Federal Savings and Loan Association, which is a mutual association and that they are legally and equitably entitled to use a small portion of their own funds for the protection and preservation of

the corpus of the main fund which consists of the assets and funds of the Long Beach Federal Savings and Loan Association, and to prevent the merger, consolidation, or commingling of the Long Beach Federal Savings and Loan Association, and/or its assets, with any other association or institution and to preserve the said funds and assets of said association and to prevent further runs and to protect against their further dissipation by the resistor defendants A. V. Ammann and John H. Fahey, and to aid and assist in obtaining the ultimate return of the Long Beach Federal Savings and Loan Association and its assets, to the managament of their, the shareholder members. own choice.

Now Therefore, the clerk of this court is hereby ordered to pay from the moneys and funds of the Long Beach Federal Savings and Loan Association now on deposit with him in this action the following amounts of money to the following persons:

1. To the plaintiffs, to reimburse them for their costs and expenses incurred prior to March 1, 1947, the sum of $15,530.29.

2. To Westover and Smith. Attorneys for the plaintiffs, to reimburse them for their costs and expenses, incurred prior to March 1, 1947, the sum of $1,534.77 and the sum of $230.07, incurred prior to March 1, 1947, by their associate counsel in Washington, D. C., Daniel W. O'Donoghue, Jr., Esquire, to wit, the total sum of $1,764.84.

3. To Westover & Smith, Attorneys for the plaintiffs, as an interim allowance on account of attorneys' fees for services rendered by them and their associate counsel prior to March 1, 1947, the sum of $50,000.00.

Dated at Los Angeles, this ... day of , 1947.

PEIRSON M. HALL,
Judge of the District Court.

Approved as to form:

WESTOVER AND SMITH
By Wyckoff Westover
Wyckoff Westover

JAMES M. CARTER
United States Attorney
By Ronald Walker
Assistant U. S. Attorney

RAY E. DOUGHERTY
Of Counsel

CHARLES K. CHAPMAN
Charles K. Chapman—Esquire

THOMAS & WALLACE
By Harry O. Wallace
Harry O. Wallace—Esquire

RAYMOND TREMAINE
Raymond Tremaine—Esquire

[On cover]:

"Received copy of the within proposed findings and order this 12th day of April, 1947. James M. Carter, U. S. Attorney; by E. H. Mitchell, Assistant."

In the District Court of the United States, in and for the Southern District of California, Central Division.

Paul Mallonee, *et al.*, Plaintiffs, vs. John H. Fahey, *et al.*, Defendants.

Civil File No. 5421-P. H.

AFFIDAVIT OF MAILING OF PLAINTIFFS' PROPOSED FINDINGS OF FACT AND ORDER FOR INTERIM PARTIAL ALLOWANCE ON ACCOUNT OF EXPENSES AND ATTORNEYS' FEES INCURRED BY PLAINTIFFS, THE SHAREHOLDER MEMBERS PROTECTIVE COMMITTEE, PRIOR TO MARCH 1, 1947.

State of California, County of Los Angeles.

Martha Watson, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles, that affiant is over the age of eighteen years and is not a party to the within and above entitled action, that affiant's business address is 215 West 6th Street, Los Angeles, California; that on the 11th day of April, 1947, affiant served three copies of the following document:

Plaintiffs' Proposed Findings of Fact and Order for Interim Partial Allowance on Account of Expenses and Attorneys' Fees Incurred by Plaintiffs, the Shareholder Members Protective Committee, Prior to March 1, 1947, on the defendants in said action, by placing one copy thereof in an envelope addressed as follows:

A. V. Ammann, c/o his attorney
James M. Carter, United States Attorney
Attention Ronald Walker,
Assistant United States Attorney
Room 600 U. S. Post Office and Court House Bldg.
Los Angeles 12, California

and by placing one copy thereof in an envelope addressed as follows:

John N. Fahey, c/o his attorney
James M. Carter, United States Attorney,
Attention Ronald Walker,
Assistant United States Attorney
Room 600, U. S. Post Office and Court House Bldg.
Los Angeles 12, California

and by placing one copy thereof in an envelope addressed as follows:

John H. Fahey, c/o his attorney
Ray E. Dougherty, Associate General Counsel
Federal Home Loan Bank Administration
Room 600 U. S. Post Office and Court House Bldg.
Los Angeles 12, California.

and then and there by sealing said envelopes and depositing them, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California. That there is delivery service by regular communication by mail between the place of mailing and the places so addressd.

MARTHA WATSON.
MARTHA WATSON.

Subscribed and sworn to before me this 11th day of April, 1947.

(Seal) FAY V. HEALEY,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Feb. 24, 1951.

IN THE

District Court of the United States

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 5421-PH Civil

HONORABLE PEIRSON M. HALL, JUDGE PRESIDING.

PAUL MALLONEE, C. H. NEWHOUSE, and WINNIE BUCKLIN, etc.,

Plaintiffs,

JOHN H. FAHEY, individually, JOHN H. FAHEY as CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, etc., *et al.*,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS.

Los Angeles, California.
April 7, 1947.

Appearances:

For the Plaintiffs: Westover & Smith, 215 West Sixth Street, Los Angeles, California; by Wyckoff Westover, Esq.

For the Defendant Title Service Company: Thomas & Wallace, 602 Jergins Trust Building, Long Beach, California; by Harry O. Wallace, Esq.

For the Defendant Long Beach Federal Savings and Loan Association: Charles K. Chapman, Esq, Ocean Center Building, Long Beach, California.

For the Defendant A. V. Ammann, individually, and as Conservator, and John H. Fahey, individually and as Commissioner: James M. Carter, United States Attorney, Los Angeles, California; by Ronald Walker, Assistant United States Attorney, and Ray E. Dougherty, Esq.

For the Defendant and Cross-Complainant R. H. Wallis: Raymond Tremaine, Esq., 210 West Seventh Street, Los Angeles, California.

[Rep. Tr. p. 3, lines 1 to 25]:

Los Angeles, California; April 7, 1947; 10:00 o'clock A. M.

The Clerk: No. 5421-PH, Civil; Paul Mallonee, *et al.*, v. John H. Fahey, *et al.*

Mr. Westover: Ready for the movants, the plaintiffs, your Honor.

Mr. Walker: Ready.

Before we get into the motions, I would like to move the admission to this court for the purpose of this case and in association as counsel of record in the case Mr. Ray E. Dougherty. Mr. Dougherty is a member of the bar of the District of Columbia, South Dakota and Nebraska.

The Court: Any objection?

Mr. Westover: None whatever, your Honor.

The Court: The motion is granted.

I took all these files, not all of these files—how many volumes are there, Mr. Clerk—I took Volumes IV and VI home with me over the weekend and have read all of the affidavits, the motions, the points and authorities submitted and filed on behalf of each of the parties. I have

at home a lawyer's edition of the United States Supreme Court reports and had access to, not all but a number, of the cases that were cited.

I want to say at the beginning that I was very much disappointed in the memorandum of points and authorities [Rep. Tr. p. 4, lines 1 to 25]:

filed by the Government. I did not find any case which they cited of the Supreme Court cases in point. They were all to the general proposition that where a specific stay had been made on a final judgment and the conclusion of a matter, for instance, that one on the matter of contempt, obviously the Supreme Court had at that time the power to punish for contempt. Whether they still have the power to punish for contempt or not, I do not know. The new Federal Rules of Civil Procedure, which certainly take away from the District Court powers to punish for contempt, has to be charged criminally now, and a right to a jury trial, unless it is committed in the presence of the Court and then they can certify that they saw and heard it. Of course these are the rules in the District Courts.

I would like also to observe that it seemed to me to come with very poor grace that an agency of the United States Government would suggest, as they did, the matter of contempt. While it was stated in the motions and orders that the movants here were the ones that were guilty of contempt, the obvious insinuation was that this court, by proceeding in hearing it, would itself be guilty of contempt of the Supreme Court.

There is one point that the defendants raise, and to me the whole thing turns on it and not on any other point, and that is whether or not the stay order was broad enough in its terms to prevent this court from hearing

[Rep. Tr. p. 5, lines 1 to 25]:

not only these matters but from doing any of the things which it has already done. If a stay order is as broad as the defendants, who in these proceedings designate themselves as—what do you call yourselves here?

Mr. Dougherty: Resistors.

Mr. Walker: We filed a resistance, your Honor, so you can call us resistors if you wish.

The Court: If it is as broad as the defendants claim, then I have committed contempt by allowing each one of the interventions, and each one of the orders in intervention that I have made is void, and the effort to keep these parcels of property moving and give people merchantable titles who, in good faith, either secured loans from that association before its seizure, all those proceedings are not only contrary to the terms of the order but it would seem to me that they would be absolutely void. So if that is the case, that is to say, if this stay order is that broad I think I had better find out right now. I have studied it very carefully and it does not seem to me that it is that broad.

I would like to hear from you on that, Mr. Walker.

Mr. Walker: We had expected that Mr. Dougherty would argue this matter. I would be glad to answer your questions, however.

The Court: Whoever it is that is going to carry the burden in connection with the matter, I would like to hear

[Rep. Tr. p. 6, lines 1 to 25]:

from them.

Also it seems to me that Section 792 of Title 28 is particularly applicable in connection with these matters because it excepts matters that are corollary and collateral to things which are heard by 3-judge courts and let them

be decided by lower courts, but provides that if, for instance in this case or in any petitions in intervention heretofore made, that they are final orders and that the other side can appeal, that is, the Government could appeal from those petitions in intervention.

Mr. Dougherty: I think so, if your Honor please.

The Court: In other words, if I do have jurisdiction to hear this matter and the stay order is not as broad, this then becomes a final order in so far as the matter that it encompasses and anybody who is a party to the action who is a party to the action and feels aggrieved may appeal.

Mr. Dougherty: I think the case of Trustees v. Greenough (105 U. S. 527) is authority for that, if your Honor please.

The Court: That is the way it seems to me, and while that was decided before this statute, it seems to me that the specific terms of the statute permits that.

Mr. Doughery: I think so.

Now, if your Honor please, while I am carrying the laboring oar and it seems it might be a rather heavy one from the prefatory remarks which your Honor made, [Rep. Tr. p. 7, lines 1 to 25]:

I should, however, like to state first that so far as the matter of contempt is concerned, our position on that is simply this, that if there is any contempt in the matter it would be of course a matter for the Supreme Court, if and when the Supreme Court desired to take cognizance of it. So far as this court is concerned, there could be no contempt, in my opinion.

The Court: I do not know. If anybody would be guilty of contempt, I would be also, but I do not know.

Mr. Dougherty: This court is only permitting these movants the right to come in and present their petition.

The Court: If I permit them to come in and present their petition, suppose I grant it, then if anybody is guilty of contempt I am just as much as they are, and I cannot believe that the administration of justice, or the powers of the Supreme Court, have been construed to the point where they are denying the lower courts the discretion to hear and examine. If I haven't any power, I haven't any power to let them file it. They have no business inside the courtroom doors. The Clerk has no business accepting it.

Mr. Dougherty: I take it that your Honor would not enter any order in contempt of the Supreme Court.

The Court: I would not do it consciously.

Mr. Dougherty: I am sure of that.

The Court: But if I am in contempt, you certainly have [Rep. Tr. p. 8, lines 1 to 25]:

to give a much stronger demonstration than you did in your memorandum.

Mr. Dougherty: Those cases were submitted for whatever benefit they might be to this court. We are not urging that point in our oral argument, if your Honor please. We do believe that the first question that should be determined here is whether or not this court does have jurisdiction to hear this matter. If our position is correct, that this court does not have jurisdiction, there is no purpose in arguing the matter on the merits. We have, however, set up our theory in the memorandum of authority on the merits in the case, but I don't propose to present that here unless your Honor desires.

The Court: That is the first point. The first point is the stay, how broad that stay is. Have you it before you there?

Mr. Dougherty: I have it before me, if your Honor please.

The Court: Let us read it.

Mr. Dougherty: Yes.

"Defendants, John H. Fahey and A. V. Ammann, having submitted request for a stay of execution and enforcement of the decree herein in so far as it provides for the immediate removal of defendant, A. V. Ammann, as conservator, the restoration of the Long Beach Federal [Rep. Tr. p. 9, lines 1 to 25]:

Savings and Loan Association to its former directors, or for relief other than through an interlocutory injunction restraining merger, consolidation, or commingling of the association or its assets with any other association pending a final disposition of the defendants' appeal by the Supreme Court of the United States,

"And it appearing that such request should be granted,

"It Is Hereby Ordered that the execution and enforcement of said decree be, and it hereby is, stayed (except to the extent that it restrains a merger, consolidation, or commingling of the association or its assets with any other association) pending the decision of the Supreme Court of the United States on the defendants' appeal and for a period of thirty days thereafter * * *"

Now, if your Honor please, my copy does not go beyond that, but I believe that it contains—

The Court: "and that if the said directors have already taken possession of the said Long Beach Federal Savings and Loan Association, that the conservator, A. V. Ammann, be placed back in possession forthwith."

[Rep. Tr. p. 10, lines 1 to 25]:

That is the end of the order.

Mr. Dougherty: In that order the Supreme Court said that a stay of execution of the decree, in so far as it provides for relief other than through an interlocutory injunction restraining merger, should be granted. That means that every single provision of the decree is stayed except only the one provision for an interlocutory injunction restraining merger, etc.

This court in its decree provided, at Paragraph 14 thereof, the following:

"There is reserved to the District Courts the right to make such other and further orders herein as shall hereafter be necessary to determine collateral issues hereto and to give to this decree full force and effect."

I think that this provision was stayed by the order of the Supreme Court.

This application is an attempt to have this court determine a collateral issue. Since the entry of the stay order by the Supreme Court, that is now without the power of this court, I believe. The stay order of the Supreme Court states every single provision of the decree except the one restraining a merger, consolidation or commingling of the association or its assets with any other association.

Now I might say this also, the decree to a very large [Rep. Tr. p. 11, lines 1 to 25]:

degree at least decided the right to the funds which are deposited in the court. By Paragraph 10 of the decree the court attempted to adjudicate the ownership of the impounded funds, but that provision of the decree is likewise stayed by the Supreme Court's order. To dispose of the funds would therefore violate the stay order in that it would give immediate effect to a decree of this court which the Supreme Court says shall not be given effect.

The Court: Just a moment. You say Paragraph 10?

Mr. Dougherty: I think that is right, your Honor. I do not have the paragraph of the decree before me, if your Honor please, but that is as I recall it.

The Court: Do you wish it?

Mr. Dougherty: No, not at the moment. As I recall, and your Honor can correct me if I am incorrect on this, that paragraph provided that neither Ammann nor anyone else shall have any right or claim to these funds. The Supreme Court could very well, in the present controversy if it should be determine to reverse, say that those funds were in the jurisdiction of the appeal for disposition.

In other words, it seems clear to me that the Supreme Court has deprived this court of jurisdiction to determine the matters presented by the applications or to dispose of the funds which it holds. If this court should enter an order paying out a portion of these funds, the Supreme Court would be deprived of jurisdiction to exercise effec-

[Rep. Tr. p. 12, lines 1 to 25]:

tively its control which I believe it has.

The Court: In the present appeal?

Mr. Dougherty: I think it has, if your Honor please.

The Court: Those funds are there by interpleader, are they not?

Mr. Wallace: Yes, your Honor.

The Court: They were not put there by Ammann or by the association or by the plaintiff, they were precipitated—

Mr. Dougherty: The right of interpleader is questioned in the present appeal, if your Honor please, as to whether or not it is a valid interpleader. That is one of the questions that the Supreme Court has before it.

The Court: All right. Go ahead.

Mr. Dougherty: That is practically all I have to say, your Honor, relative to the stay order, if your Honor please.

The Court: If this were a final disposition of the case, in other words, if the Supreme Court could finally and completely and ultimately determine all the issues in this matter by decision on the present appeal, that is one thing, it would seem to me that if that were the case the stay is complete, but I do not think they can dispose of everything involved in this lawsuit and the various interpleaders in the present case, and even so they have excepted the matter of the commingling of the assets. That is one of the issues before the Supreme Court still raised on the [Rep. Tr. p. 13, lines 1 to 25]:

appeal. So if it is necessary, in the preservation of that right which the stockholders' committee or shareholders' committee, or whatever they call themselves here have, to have or not to have their assets commingled, it would seem to me that I would have jurisdiction.

But let us go to the first one first that I stated a moment ago. If the case is reversed, does this court have anything else to do?

Mr. Dougherty: Your Honor please, I do not know. It will depend upon what angle the Supreme Court might take on it.

The Court: Just suppose they reversed us completely and said that the 3-judge court was wrong in everything they did.

Mr. Dougherty: If they did that, this court would be without any further jurisdiction.

The Court: This court would have nothing else to do in the matter?

Mr. Dougherty: I think very little else to do, if your Honor please, because one of the questions was the jurisdiction of this court, to begin with, as to the indispensability of Fahey, whether Section 1178 of Title 28 applies in order to give jurisdiction, and if this court were reversed on all those angles—

The Court: And on everything we did.

[Rep. Tr. p. 14, lines 1 to 25]:

Mr. Dougherty: Well, you would probably have to spread it on the record.

The Court: Spread the mandate on the record?

Mr. Dougherty: Execute the mandate; yes, your Honor.

The Court: Is everything at issue on the appeal? Is everything we did at issue?

Mr. Dougherty: I think so. That is the position that the defendant is taking in the brief which has been prepared.

Mr. Wallace: I trust they will remain within their assignments of errors.

Mr. Dougherty: I think we have.

Mr. Chapman: I am interested in what is going to happen to the million dollars in the registry if they should happen.

The Court: Yes. I don't know. That is what I am trying to find out. Would this court have anything to do with that? We would spread the mandate on the minutes, and then what?

Mr. Dougherty: I think the money would go to the association.

The Court: How would they get it?

Mr. Dougherty: By virtue of your authority to put into execution a mandate of the Supreme Court. This court would have that authority, of course.

Mr. Tremaine: Would Mr. Wallis get his $50,000 back?

Mr. Dougherty: I don't know.

[Rep. Tr. p. 15, lines 1 to 25]:

The Court: Of course I do not have before me the briefs and all of those matters that are pending before the Supreme Court. I do not think that I have the assignment of errors.

Mr. Wallace: If you have the file, you can find it at page 859, if your file is paged.

The Court: No, this file is not paged.

All right. Suppose the case were affirmed, would this court have anything else to do?

Mr. Dougherty: I think so, if your Honor please, about the same as you would have to do if it were completely reversed, spread the mandate on the record and execute it.

The Court: What about the interpleader involving the issues in the San Francisco bank? We have that interpleaded in here, the consolidation of the Los Angeles bank with the San Francisco bank. Is that in issue in the Supreme Court?

Mr. Dougherty: My own opinion of it, if your Honor please, is that it was not in issue in this case.

The Court: It was not in issue in this court at that time, but it has since been interpleaded and, incidentally, in connection with the filing of motions and people appearing in this court, it seems to me as though after the appeal was taken, I mean the suggestion of contempt, that

Mr. Fahey and Mr. Ammann filed quite a few motions after they filed their appeal in this court, motions to dismiss, motions to do this, that and the other. There was a whole series of them.

[Rep. Tr. p. 16, lines 1 to 25]:

Mr. Dougherty: Subject, however, to the Supreme Court's jurisdiction in each case.

The Court: Was that stated in the motions?

Mr. Dougherty: That was so stated in each case.

Mr. Chapman: I would like to know where.

The Court: Isn't this subject to the jurisdiction of the Supreme Court in this case, anything I might do here?

Mr. Dougherty: I think so, if your Honor please.

The Court: What is the difference then? However, I think that that matter is an issue in this case. It was raised in the pleadings but it was not covered in the decree, that is, the consolidation of the—I do not know how you refer to it—the elimination of the Los Angeles bank and its rebirth as the San Francisco bank.

Mr. Dougherty: If your Honor please, it is of course our contention that that is an entirely separate and distinct issue and has no more place in this case than a divorce case between John Jones and his wife out here.

The Court: That matter is not passed on yet. I haven't passed on it yet.

Mr. Dougherty: That is true.

The Court: So if the Supreme Court sent a mandate down I would have to pass on that, wouldn't I? Suppose they reversed me, I would still have to pass on that.

Mr. Dougherty: I can't tell just what the Supreme

[Rep. Tr. p. 17, lines 1 to 25]:

Court may say in this case. I think they could dispose of it very well inside their general equity jurisdiction, and if the main action fell the interpleader would fall in that case, even assuming it was an interpleader.

Mr. Wallace: Are you now referring to my interpleader or the one Judge Hall referred to?

Mr. Dougherty: I am speaking of the one Judge Hall referred to.

The Court: I think they call it the San Francisco bank interpleader.

Mr. Wallace: Intervention, I think they call it.

Mr. Walker: Third party complaint filed on behalf of the Home Loan Bank of Los Angeles against the Home Loan Bank of San Francisco.

Mr. Chapman: No, it is a third party complaint filed on behalf of the association, whose millions of dollars of assets were being transferred and have been transferred since this appeal, incidentally, to one of three banks and we don't know which one is duly constituted.

The Court: That is all you have to say on this point?

Mr. Dougherty: On that point, if your Honor please.

The Court: Let us dispose of that point first. Let us hear from the other side.

Mr. Dougherty: I do feel, however, that there is more here than just the stay order, and if your Honor will [Rep. Tr. p. 18, lines 1 to 25]:

permit me I should like to address myself briefly to the appeal itself outside the stay order and its effect upon this proceeding. I think that the line of cases, the Slaughter-House case, for instance, 10 Wall. 273, when it said, "Judgment and decrees of the Circuit Court are

brought here for re-examination and the only effect of the supersedeas is to prevent all further proceedings in the subordinate court except such as are necessary to preserve the rights of the parties," the 3-judge court by its decree, it seems to me, determined somebody had a right to these funds.

Mr. Westover: Might I interrupt to ask if we could have the full titie and citation so that we could send for it?

Mr. Dougherty: They are called the Slaughter-House cases.

Mr. Westover: Are they cited in your memorandum?

Mr. Dougherty: No. It is 10 Wall. 273.

Mr. Westover: Thank you.

Mr. Dougherty: The decree of the court determined that somebody had a right to these funds. That right is in litigation. It certainly is not preserving the right when the funds over which a part of the controversy exists are dissipated. On the contrary, at this stage of the proceedings to dispose of those funds, or any part, seems to me would destroy a right which the Supreme Court may later say exists in one of the parties.

[Rep. Tr. p. 19, lines 1 to 25]:

The Court: Let us see. What are we seeking to preserve here?

Mr. Dougherty: The fund which is in the court.

The Court: Is that all this litigation is seeking to preserve?

Mr. Dougherty: Everything else, if your Honor please. All of the funds of the association.

The Court: Where is this Slaughter-House case?

Mr. Dougherty: 10 Wall. 273.

The Court: The Butchers' Benevolent Association of New Orleans v. Crescent City Live-stock Landing and Slaughter-House Company. It is indexed, however, under "S," Slaughter-House cases.

Mr. Westover: May I borrow your Honor's volume a moment?

(The volume referred to was passed to counsel.)

Mr. Dougherty: In the case of Goddard v. Ordway, 94 U. S. 672, which I think is one of the leading cases on this matter, in that case it was a suit in equity to subject to the payment of a debt a portion of the profits as they accrued to the defendant in the porfrmance of a contract between himself and the United States. A receiver was appointed to collect the moneys payable to the defendant under the contract and retain them to await the result of the suit.

Upon final hearing below the bill was dismissed and an appeal was taken. When the appeal was taken the re- [Rep. Tr. p. 20, lines 1 to 25]:
ceiver had about $25,000 in his hands. The appellant asked the receiver to pay over money, and notwithstanding the appeal asked interference of the Supreme Court for its protection. The court said:

> "When this appeal was taken, the only execution there could be, of the decree below, was the collection of the cost and the delivery of the fund in court, which is the subject matter of the litigation, to the defendant. To that end, a further order of the court was asked; but such an order would be in aid of the execution of the decree which has been stayed and, consequently, beyond the power of the court to make until the appeal is disposed of."

In that case the court said:

> "While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for what would be to defeat our jurisdiction."

Then in the Bronson case, I think it was, Bronson v. LaCross & Milwaukee Railroad Company, 1 Wall. 405—

Mr. Westover: Is that cited in the brief?

Mr. Dougherty: That is cited in the brief.

That case involved a foreclosure of a mortgage on a [Rep. Tr. p. 21, lines 1 to 25]:

railroad. A decree of foreclosure was entered and an appeal was taken. Pending the appeal the District Court entered an order directing the receiver, into whose hands the LaCross & Milwaukee Railroad assets had been placed, to turn over the road and its equipment to another railroad, one of the appellants, and directing that the appellant keep the road, its rolling stock, etc., in good condition.

It was held by the Supreme Court that where a decree had been rendered affecting property in litigation, the court below being in custody of such property had full power to adopt proper measures to protect it from waste or loss, and where a railroad was the property reasonably to apply its revenues to its conservation but not to appropriate them beyond this and among litigating persons.

I do not wish to urge this matter much further. I think that the list of cases contained under Point II of the supplemental brief have not yet been answered, and I think that they set forth the law as to the right of a court to dissipate assets in its custody during the pendency of an

appeal. I would like to strike the word "dissipate" and say pay out, or permit the payment out of assets in its custody pending an appeal to a higher court.

The Court: What is that section of Title 28? I had 792.

Mr. Dougherty: 792 is right, your Honor.

Mr. Tremaine: It is a 1942 amendment, your Honor. [Rep. Tr. p. 22, lines 1 to 25]:

Mr. Dougherty: I might call your Honor's attention to one other case, in which the Circuit Court of Appeals of the Second Circuit, in the case of Dickinson v. Rinke, 132 F. (2d) 884—I think that is cited in the brief—used the following language:

> "Here, after an appeal was taken from a final judgment in the suit, the District Court held further hearings and sought to exercise its discretion in an ancillary matter as to which it had deliberately reserved judgment pending the determination of the merits in the main action. Such a practice would entail serious inconvenience in splitting up for purposes of appeal matters which should come up on a single record. Because an appeal had been taken in the main action, the District Court was without jurisdiction to enter the order of August 25, 1942."

The Court: I think if it was something else besides the allowance of attorneys' fees or moneys expended for their preservation of the assets of the association and their rights, for which the various litigants are contending here, that it might be encompassed within the appeal. For instance, if I should hold that the defendant Ammann, if I should start regulating and hearing orders to show cause on the method of his doing business, whether he shouldn't buy bonds or stocks or something or another,

[Rep. Tr. p. 23, lines 1 to 25]:

I think there that I would be interfering with the matter that is now on appeal. But here I cannot seem to get the idea out of my head that these moneys here—it is not like two groups of stockholders fighting over money, there isn't any doubt so far as the conservator is concerned that these moneys do not belong to him or the United States Government, they belong to the stockholders, the depositors. It is their money.

Mr. Dougherty: They belong to the Long Beach Federal Savings and Loan Association.

The Court: And who does that belong to?

Mr. Dougherty: It belongs to the shareholders, not to the directors.

The Court: I did not say the directors, counsel, I said the shareholders.

Mr. Dougherty: That is right.

The Court: In other words, it is their money. I cannot get that idea out of my mind. And they want to preserve their funds to be expended in the way that they choose to have them expended.

In other words, the fund is to be preserved for its rightful owner, whoever that might be. So sooner or later these funds, whoever they belong to, belong to those shareholders, so it is their money that is bound to be spent here whether the Supreme Court reverses, affirms, or whatever they might do. It is only their money. It [Rep. Tr. p. 24, lines 1 to 25]:

isn't Ammann's money or Fahey's money or the Government's money. It is only their money.

Mr. Dougherty: But the Government does owe, and so does Mr. Fahey and so does Mr. Ammann, a duty to prevent the dissipation of those funds, if possible.

The Court: Yes, they do, but it is their money, and at the same time these people who are officers of the Government are using that very money to prevent these very people from spending their own money the way they say they think it ought to be spent. In other words, the administration of this affair is not taken out of public funds, is it?

Mr. Doughterty: A large part of it is; yes, your Honor.

The Court: Is it not charged up to this association?

Mr. Dougherty: A large part of it will never be charged up.

The Court: Is any of it charged up?

Mr. Dougherty: The actual expense of operating is charged up.

The Court: And is this litigation part of the expense of operating?

Mr. Dougherty: No, sir.

The Court: All the litigation expenses?

Mr. Dougherty: The Government's expense—

The Court: Comes out of the taxpayers' fund.

[Rep. Tr. p. 25, lines 1 to 25]:

Mr. Dougherty: I am afraid so.

The Court: I thought this agency you were with is self-supporting and turned a profit over to the Government.

Mr. Dougherty: If you will pardon me, your Honor, it comes from the banks themselves, the banks throughout the United States. The eleven Federal Home Loan Banks support the Federal Home Loan Bank system.

The Court: It isn't the taxpayers' money?

Mr. Dougherty: No.

The Court: So it partially comes from these people here who are part of the Home Loan Bank system, are they not?

Mr. Dougherty: I would doubt that very seriously.

The Court: If they are not, how did Fahey get in here?

Mr. Dougherty: The only relation these people have to the bank system is to borrow money and pay the usual rate of interest for it and to use those trade facilities when they do so. Whether or not this litigation goes on will not change their right to borrow money at the usual interest rate or anything of that nature.

Mr. Chapman: I would like to disagree with that. We are stockholders to the extent of $360,000.

The Court: That is undenied.

Mr. Chapman: It depends on what they do with the fund on our stock.

The Court: Have you concluded your statement? [Rep. Tr. p. 26, lines 1 to 25]:

Mr. Dougherty: Unless you have further questions.

The Court: No, I do not have any now.

Mr. Westover: Might I ask counsel under what point Dickinson v. Rinke is cited, do you recall?

Mr. Dougherty: I will look. I thought it was cited.

Mr. Westover: I think it is, but I do not seem to find it quickly.

Mr. Dougherty: It is cited under Point II on page 3 of the supplemental memorandum.

The Court: I see it is shortly before noon. Would you prefer to start now?

Mr. Westover: Whatever is agreeable. I will admit that I have not read the Slaughter-House cases that have just been cited by counsel.

The Court: They are only cited on one point. They are usually cited, I think, on the Fourteenth Amendment.

We will recess until 2:00 o'clock.

Mr. Westover: Your Honor please, might I ask the indulgence of the court? Unbeknownst to myself a short order to show cause has been set in the Superior Court in a divorce matter for 1:45. I have tried to stipulate with counsel and I assume he is going to, but I may be a little late and I would appreciate, since I am next up apparently, if we could have a little more time.

The Court: Can you be through by 2:15?

[Rep. Tr. p. 27, lines 1 to 4]:

Mr. Westover: I think so.

The Court: Recess until 2:15 then.

(Whereupon, at 11:55 o'clock a. m., a recess was taken until 2:15 o'clock p. m. of the same date.)

[Rep. Tr. p. 28, lines 1 to 25]:

Los Angeles, California; April 7, 1947; 2:15 o'clock P. M.

The Court: Mallonee v. Fahey.

Mr. Walker: Ready.

Mr. Westover: Ready for the plaintiff, your Honor.

The Court: All right, Mr. Westover.

Mr. Westover: I think at first I would like to take the opportunity of welcoming Judge Dougherty to counsel of record, since he has been with us for some time, but we are happy to have him now counsel of record.

In response to his argument this morning, it seems to me there are only one or two points that need reply.

First of all, your Honor expressed some interest in the stay order.

The Court: Some interest? I think that is the turning point.

Mr. Westover: That is as I understand your Honor's comment.

If your Honor will note the language of the stay order, it is: "It is hereby ordered that the execution and enforcement of said decree be, and it hereby is, stayed * * *" The stay order limits itself solely to those things.

The Court: To the execution and enforcement of the decree.

Mr. Westover: Of the decree itself.

[Rep. Tr. p. 29, lines 1 to 25]:

The Court: It does not stay the operation of the decree otherwise.

Mr. Westover: No, I don't think so.

The Court: Other than by execution and enforcement.

Mr. Westover: Execution and enforcement only, and it only stays the proceedings in so far as they were contained in the decree as distinguished from any other proceedings collateral or incidental or administrative that might occur.

I think probably your Honor has already put your finger right on the point. That is the gist of the entire matter.

The Court: Let me ask you the same question I asked Mr. Dougherty. Suppose the Supreme Court reversed the 3-judge court in everything, saying we were wrong on all scores, would there be anything left for this court to do?

Mr. Westover: I think so; yes, your Honor. The only thing that bothers me a little bit is as to the motions to dismiss. If they reversed the 3-judge court on the question of the motions of dismissal, that might dismiss the entire action. Outside of that one possible thought there would be a great deal left to do. A mere reversal of the ruling of unconstitutionality and of the injunctive features would still leave open many additional questions, such as the abuse of discretion, even if there were constitutionality in the section itself.

The Court: Yes, if they limit it to that then this court [Rep. Tr. p. 30, lines 1 to 25]:

would have to decide the constitutionality of the rules and regulations and then they would have to decide if they were constitutional whether or not the acts done under them were an abuse of discretion, because you can have constitutional laws, you can have constitutional rules, you can have constitutional regulations but you can still have unconstitutional conduct.

Mr. Westover: That is right, your Honor. And likewise you could even go on and have an abuse of discretion, the abuse of the power that they had, if they actually had them.

So I think there are many things that would still be left to be done that are outside of the decree. I think in our briefs we have touched lightly on the point that a supersedeas and a stay of execution may have some slight distinction. The cases on supersedeas may be slightly different as a supersedeas is somewhat of a blanket, while a stay order such as this is limited by its own language to just exactly what it is directed to and nothing else.

The Court: I think that is true, and I think in this case I am guided by the stay order and not by any general

supersedeas. Had there been a general supersedeas it would have to await the filing of the appeal.

Mr. Westover: That is right.

The Court: Had the Supreme Court intended that a general supersedeas should have operated differently than [Rep. Tr. p. 31, lines 1 to 25]:

this they would have waited until the filing of the appeal, it seems to me, before they did the very unusual thing of issuing a stay order where a 3-judge court has unanimously acted in refusing a stay without any of the record before them or representation of any of the parties.

Mr. Westover: That is correct, your Honor. And even one further point, making it mandatory.

The Court: So I am concerned with this proceeding. I deem it settled that I am guided by the stay order and not by any general supersedeas.

Mr. Westover: I think that is sound, your Honor.

I do not believe there is any need to go into the decree itself.

The Court: Do not be too sure of that.

Mr. Westover: I do not want to take your Honor's time in reviewing the decree other than to point out that the particular provision in the decree that counsel referred to this morning, I believe Item No. 10, apparently is purely a matter of, I might say it is a quiet title action against named partes Ammann and Fahey, and counsel probably inadvertently said "and other persons." It does not state anything about any other persons. It simply says "that neither the defendant A. V. Ammann, nor the defendant John H. Fahey in their representative capacities have had any right, title or interest, or claim to any of the proper-

[Rep. Tr. p. 32, lines 1 to 25]:

ties herein mentioned * * *" It does not extend to unnamed parties but only to those two named parties.

The Court: Will this interfere with the execution and enforcement of the decree?

Mr. Westover: In no way, so far as I can see, your Honor, because your Honor is acting entirely outside of the decree. The decree makes no mention of attorneys' fees or expenses advanced.

The Court: But they say if you make an allowance here it will have to come out of the funds that are on deposit in court. If that is so, then those funds are decreased in amount and the execution and enforcement of the decree will be interfered with.

Mr. Westover: If your Honor please, in answer to that, if that were true then—first of all I would like to point out that our motions are going not to just the funds on deposit in the court, they go to all of the funds of the association, which we feel have been prevented from being commingled and dissipated.

The Court: I know that, but I mean the money that you receive on this fee would be paid from the deposit in court.

Mr. Westover: Probably so. At least I take it that would be the practical way to do it.

But in any event, that would be—let us take, for example, one-half of 1 per cent of the amount involved in [Rep. Tr. p. 33, lines 1 to 25]:

this litigation, the 26 million dollars, $130,000 would only be one-half of 1 per cent of the funds here involved, and I believe that where it is in preservation and aid of preserving the funds for the rightful owners thereof, and

we feel that is what our main objective is and has been, and through the decision of the 3-judge court and your Honor those funds have been preserved and should be continued to be preserved, and we feel that an allowance to permit us to continue to so preserve them and to fight for their preservation is only equitable and fair and is a nominal amount.

The Court: Let me see. How are you preserving them? You are endeavoring to preserve them in two ways, if I understand: first, by saying that they should be administered by the parties whom the shareholders have chosen to administer them and, secondly. that they should not be commingled.

Mr. Westover: That is right. And thirdly that the decision of this court, of the 3-judge statutory court, should be upheld.

The Court: That is your immediate objective, but I mean your ultimate objective is the two things that I have mentioned?

Mr. Westover: That is right.

The Court: Now the matter of the commingling with other associations or other funds is involved in the appeal?

Mr. Westover: Only to the extent that the stay order [Rep. Tr. p. 34, lines 1 to 25]:

has excluded that phase of it.

The Court: You mean the Supreme Court is not going to consider whether the resistor here has the right to commingle this?

Mr. Westover: I am sorry, your Honor, no. Certainly on appeal that question will be part of the appeal question, but the stay order excludes that phase of the lower court's judgment.

The Court: Yes, I know that. But I just said a moment ago, as I see it, you have two means here that you want to preserve the assets by. One of them is to preserve them in the form that you had before they were taken by having the people of their own choosing manage them, and thus preserve them by earning the money that that management would produce.

Mr. Westover: And has produced.

The Court: And the second one is to prevent the resistor-conservator from commingling them with funds of other associations elsewhere.

Mr. Westover: And to do that effectually finally it is incumbent upon us to sustain this court's decision and judgment.

The Court: You are not asking for fees in advance, you are asking here for fees that have been earned in the past?

Mr. Westover: That is right: We are asking for replenishment of the fees that have already been, and ex-

[Rep. Tr. p. 35, lines 1 to 25]:

penses that have already been, expended and incurred up to this time.

We feel that it is only fair and equitable, and that this court on the fee application is acting as an arm of equity to give us at least the right to use our client's moneys in the preservation of what they are fighting for. It is their money, as your Honor has pointed out. Now it is in the hands of what at this moment we can call trespassers and they have those funds available. We are precluded from using them, particularly as to the undivided surplus and profit, an item of approximately $1,300,000 or thereabouts.

The Court: Is there in your judgment any distinction between the right of the shareholders' counsel, that is,

the committee who instituted the suit, who are operating under a permit from the Corporation Commissioner of the State of California as a creditor's committee for the other shareholders, to receive their reimbursement of costs and fees for their counsel and the right of the directors or the association to receive fees at this time and the right of the Title Service Company? Is there any distinction between the three?

Mr. Westover: I think there may be some slight distinction in the way they come up, but the cases have held on both situations that they are entitled to fees in equity, situations for the preservation of funds. So as a practical matter the distinction is one of approach rather than of ultimate and actual distinction.

[Rep. Tr. p. 36, lines 1 to 25]:

That California case which is cited in our brief, your Honor, Eggert v. Pacific States Savings and Loan—

The Court: Yes, that is the O'Melveny, Tuller & Myers case.

Mr. Westover: —where they allowed I think some $36,000 in fees for representing, I believe it was the officers and directors, in a matter that was lost, where they did not prevail, but they presented it fairly and properly to the court apparently.

The Court: Somebody in one of his briefs suggested the similarity between this and a divorce proceedings, or a separate maintenance proceedings, community property or separate property, where the court might from the beginning and all the way along the line, regardless of any rules or stays, make allowances for payment of attorney's fees, costs, maintenance, even though they might ultimately lose, because they recognize their right to litigate.

Mr. Westover: That is true. A deprivation of replenishment of fees and costs expended might, in effect, be a depriving of a right to be heard and follow the case clear through to the Supreme Court. In other words, it would do the very thing that should not be done and make it only a wealthy man's litigation or a Governmental agency's ability to litigate.

The Court: All right. Do you have something else to [Rep. Tr. p. 37, lines 1 to 25]:
offer? I want to ask Mr. Chapman and Mr. Wallace a question as to whether or not they think there is any distinction.

Mr. Chapman: We are waiting anxiously for our turn, your Honor.

Mr. Westover: I do not wish to take any more of the court's time. I think the Slaughter-House case cited by counsel is sufficiently distinguished, if your Honor has looked at it. That was an injunctive matter and there were no fees involved, no funds involved, but purely a matter of a stay of an injunction, and even there the court said that the lower court still had power to make such things as are necessary to preserve the rights of the parties. So I hardly think it is necessary to burden the court on that.

The Court: Let me hear from the next one who wants to be heard.

Mr. Wallace: Very well, your Honor.

The Court: Up to this moment I would say, Mr. Wallace, that my impression is that the stay does not operate to prevent a consideration of this request for fees, that I have the jurisdiction and the power to consider it, and in addition to that that I have the duty

to pass upon it. I think it is pretty clear that I have the power to grant expenses and fees to the shareholders' committee. I am not so sure that it would be in the interests of equity or that I have any power at all to order [Rep. Tr. p. 38, lines 1 to 25]:

any of the funds of this association, either now or at any other time, to be used for the payment of fees or expenses incurred by your client, the Title Service Company.

To give you something to hang your hat on and to shoot at, it looks to me like the Title Service Company is in this litigation to protect their own interests.

Mr. Wallace: To protect our own interests?

The Court: To protect their own interests as an independent corporation and not to protect the interests of the shareholders. I say that that is the way it looks to me now in reviewing the matter.

Mr. Wallace: If that is your Honor's opinion, you may be overlooking entirely the rights of some 8000 borrowers whose trustee we are.

The Court: I know, but you have that obligation under that contract with them as trustee anyhow.

Mr. Wallace: That is very true, your Honor, but if the shareholders' committee, who are members of the association, are entitled to fees for their, counsel, who have preserved the funds of the association, to wit, the deposits, securities and various other things which may go to make up those funds, does your Honor take into consideration the fact that a borrower from the association is as much a member of that association as a shareholder?

The Court: No, I do not. I consider that the share-
[Rep. Tr. p. 39, lines 1 to 25]:
holder is the member of the association, but the borrower I do not believe is a member. I think, however, that the borrowers in that association, that is, the 8000 borrowers, or whatever number there are, are people whose rights have to be protected, who are as much interested in the ultimate outcome of this litigation as perhaps anybody else. The ultimate borrowers are interested in knowing who to pay their money to and when they pay it in getting a merchantable title upon which they can act, which can be passed on by inheritance or by deed.

Mr. Wallace: That is very true, sir, but in addition to that, under the by-laws of the association and under its charter itself, if I am not mistaken, the borrowers are members of the association equally as much as are the investors.

The Court: Is that correct?

Mr. Wallace: I believe it is.

Mr. Chapman: Yes.

The Court: The borrowers are members?

Mr. Wallace: That is correct, is it not, Judge Dougherty?

Mr. Dougherty: Yes.

The Court: Well, all right. Then the borrowers are members but what does that make you?

Mr. Wallace: That makes us the representative of the borrowers by virtue of the duties cast upon us in the
[Rep. Tr. p. 40, lines 1 to 25]:
deeds of trust and the duties as enumerated in those deeds of trust, among others, are to protect the titles to

the real property which are entrusted to us and in which we hold the legal titles in trust.

In addition to that there is of course—

The Court: Do you have any duty in that respect?

Mr. Wallace: Oh, very definitely, sir.

The Court: As a trustee under trust deeds do you have any duty to keep that legal title free?

Mr. Wallace: We are directed so to do at the expense of the borrower, if necessary.

Mr. Westover: If your Honor please, may I just point out that Title Service Company was served as a defendant in this action because of the need for that matter.

The Court: I know they were served as a defendant, but the point I am trying to get at is that the Title Service Company is in here to protect themselves. They are not in here to protect as a plaintiff committee are, ostensibly, obviously and only; you couldn't be here for any other reason but to protect the interests of the shareholder members.

Mr. Wallace: We are here for a double-barreled purpose. In the first place, as your Honor has stated, to protect the skins of the corporation, the Title Service Company as such by reason of the attack upon the one hand by the conservator and the Federal Home Loan Bank [Rep. Tr. p. 41, lines 1 to 25]:

commissioner, upon the other by the demands made upon us by the association, further posed by having been made a party as a John Doe One we find ourselves in the cross-fire. Therefore we have no alternative other than to appeal to the equity arm of this court.

Upon this parallel there is the long line of equity cases almost from time immemorial, that interpleaders are entitled to fees and expenses. It was sought by the late Judge James apparently, in the Massachusetts Life Insurance case, that the adoption of the new statute precluded the award of fees. However, the Circuit Court of Appeals thought otherwise and remanded the case to him with instructions to award fees. That was one of the first matters set out in the memorandum which was submitted in support of our motion.

The Court: Yes. I noticed your citation in that case, and I am familiar with the general rule that the interpleader comes in, but usually the interpleader is a life insurance company, they come in and deposit—well, let me see, I think I had one a while back where they deposited $80,000 in court, and they asked for their fees and judgment in the amount of, I think, $250,000.

Mr. Wallace: That is a pure interpleader.

The Court: Yes.

Mr. Wallace: But where the interpleading party has an interest in the action, as Title Service Company does, by reason of the borrowers it represents in this suit, we [Rep. Tr. p. 42, lines 1 to 25]:

then fall on the other side of it with a bill in the nature of interpleader and we are equally entitled to fees in that circumstance. But the amount of fees then to be determined as set up in Hunter v. Federal Life is that which is commensurate with the amount of work to which we have been put.

Now in this matter we first have the actual interpleader and deposit of 174 promissory notes, deeds of trust and requests for reconveyance. Up to that point

it was pure interpleader. We wish to be relieved of the responsibility for those particular items.

But in the same pleading and by a bill in the nature of an interpleader we also brought before the court the matter of the 8000 other titles to real property located in this county and the counties immediately adjoining, together with the securities, to wit, the promissory notes, and it is the sum of those at least to which these various intervention proceedings have been addressed, and Title Service Company has necessarily had to take the lead, you might say, in helping these people clear their titles to their real property. That is why I say we have a double-barreled proposition.

The Court: Is there a provision in your contract that you must protect the title of the property?

Mr. Wallace: Yes, there definitely is. I don't believe I have a copy with me, however.

The Court: I can find one here, I believe. There was [Rep. Tr. p. 43, lines 1 to 25]:

a photostat of one which has a signature on it.

Mr. Chapman: There are many in the registry of the court, your Honor.

The Court: Here is one here. It is an exhibit to the affidavit of Leon Frazer. What number paragraph is that? It starts out:

"A. To protect the security of this deed of trust, trustor agrees:"

Then No. 3 reads:

"To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of beneficiary or trustee; and to pay all costs and

expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which beneficiary or trustee may appear."

Mr. Wallace: That is one of them, your Honor. I was under the impression that there is another one.

The Court: In No. 4 it states:

"Should trustor fail to make any payment or to do any act as herein provided, then beneficiary or trustee, but without obligation so to do and without notice to or demand upon trustor and without releasing trustor from any obligation hereof, may: make or do the same in [Rep. Tr. p. 44, lines 1 to 25]:
such manner and to such extent as either may deem necessary to protect the security hereof * * *"

Let me ask you this question now: When the Title Service Company acts as trustee in these cases it gets a fee, does it not?

Mr. Wallace: A reconveyance fee of $2.50.

The Court: Do you get a fee to begin with?

Mr. Wallace: No, sir.

The Court: In other words, for the whole service the fee is $2.50?

Mr. Wallace: In the ordinary case that is true; yes.

The Court: In other words, for acting as trustee the fee is $2.50 in each one of these cases?

Mr. Wallace: That is correct. And that is ordinarily for executing the reconveyance upon request.

The Court: Now on the 174 trust deeds that you deposited did you get your $2.50 in each of those cases?

Mr. Wallace: No, your Honor. They are reposing in the Clerk's office, in the registry.

The Court: Why are they deposited there?

Mr. Wallace: Because your Honor—

The Court: Because I ordered them, but why did I order them?

Mr. Wallace: By reason of the Government's claim that it was not necessary to go through all the rigmarol [Rep. Tr. p. 45, lines 1 to 25]:

so that all the money would be in one place when the time came to decide who was entitled to it.

The Court: They wanted to pay off all those at one time?

Mr. Wallace: That is correct.

The Court: Has the Government objected to the payment to you of $2.50 in each case?

Mr. Wallace: I do seem to recall something about that, but I do not want to go on record. I believe it was in the conference in your chambers when we were thrashing out the terms of the order.

The Court: Where are the payments on the notes made?

Mr. Wallace: The notes by their own terms require—

The Court: Are they payable to the Long Beach Federal Savings and Loan?

Mr. Wallace: To the association at the office of the association. Ordinarily the trustee has no duty provided everything runs smoothly, but under that Section No. 3 that you just quoted, in the case of quiet title action we would have some defense to make, in the case of condemnation action we would have a defense to make, in the case of an action of this kind, which has very definitely challenged the question as to the rights of the

beneficiaries as opposed between the association on the one hand and the consevator on the other, the trustor and maker of the note would be in the position of possible [Rep. Tr. p. 46, lines 1 to 25]:

double jeopardy if they paid to the association on the one hand, as certainly the conservator would claim that they were in default under their note and the conservator is also trustee.

The Court: Does the committee under its license from the State of California act or purport to act for borrower-members as well as for depositor-members?

Mr. Westover: For depositor-members. We have not been acting for borrower-members.

The Court: For borrowing member you have not?

Mr. Westover: We have not been particularly. We have been acting for depositor-members. Of course some of them might be both.

The Court: They may be both, but your license is for depositor-members?

Mr. Westover: Well, our license isn't particularly limited. I don't recall that it is for shareholder-members, but the point would be that there might be a conflict of interest in some future time, so we have tried to keep clear of it.

The Court: You mean between the shareholders and borrowers?

Mr. Westover: That could be. So far I don't think anything has arisen, but we wouldn't want to be in that position if a conflict should arise.

The Court: I see. So that you disclaim representing [Rep. Tr. p. 47, lines 1 to 25]:

the borrowers except as an incident of the fact that they are shareholders?

Mr. Westover: We represent the shareholder-members who have money on deposit as distinguished from borrowrs, although they might in some instances be both, of course.

Mr. Wallace: Getting back to the court's question as to our being entitled to fees—

The Court: I am not being convinced. You are not getting along very well.

Mr. Wallace: I trust that I have demonstrated sufficiently that one who comes in in the nature of interpleader is as well entitled to fees as is a pure interpleader. Does the court have any further question on that score?

The Court: No, I do not. I think one can come in in the nature of interpleader, but I still cannot get over the idea that you would have to be here anyhow.

Mr. Wallace: We would have to be here anyhow?

The Court: You would have to be here anyhow at every one of these meetings.

Mr. Wallace: Without getting paid for it?

The Court: Well, your client would have to pay. In other words, they bring you in.

Mr. Wallace: Which client?

The Court: The Title Service Company.

Mr. Wallace: The conservator claims he is my client [Rep. Tr. p. 48, lines 1 to 25]:

too. I don't know who is my client. That is why we had to bring it in in the first place.

Mr. Walker: We disclaim any such claim on the part of the conservator.

Mr. Wallace: There was handed to use 174 requests for reconveyance, am I not right?

Mr. Walker: You are speaking of legal services now.

The Court: When I was speaking of "client" I was thinking of attorney and client. You are speaking of trustee and client.

Mr. Wallace: I see.

The Court: When I say your client would have to pay I mean the Title Service Company. I cannot get over the idea that they just have to be in this litigation anyhow.

Mr. Wallace: I don't quite follow your Honor's reasoning on that.

The Court: The shareholders' committee came in and filed suit so they joined you as a party-defendant, didn't they?

Mr. Wallace: They did; yes.

The Court: So you have to be here and answer them, haven't you?

Mr. Wallace: Or default.

The Court: If you did not come in here and offer to deposit that money I doubt that the shareholders' com-

[Rep. Tr. p. 49, lines 1 to 25]:

mittee would have stood by you and let you give those reconveyances to the conservator without coming in to court and asking for an order to show cause on you as to why they should not be deposited in court and held pending the outcome of the litigation.

Mr. Wallace: No.

The Court: Or if they didn't do that, Mr. Chapman would have.

Mr. Wallace: I was so sure that he probably would have done so that that was the reason I interpleaded in the first place.

The Court: That is the point I am getting at, you would have to have been here anyhow.

Mr. Wallace: But likewise, since I had to be here, it is the old equitable principle.

The Court: And the same thing is true of Mr. Wallis, the fellow who received the $50,000 check.

Mr. Tremaine: He is in here but he is my client.

The Court: By the same token, could he come in here and would I have to allow fees to Mr. Tremaine?

Mr. Wallace: I think you could have.

The Court: Because he put the $50,000 in court?

Mr. Wallace: Yes, sir, otherwise why have any interpleader proposition?

The same is true of the life insurance companies, of [Rep. Tr. p. 50, lines 1 to 25]:

which your Honor spoke, if they didn't pay one claimant is going to sue them or the other claimant is going to sue them, and so they wish to get out from under and they interplead. As your Honor stated a moment ago, the equity side of the court has for years gone by allowed them fees for so doing. The mere fact that in so doing they are put to a very, very small amount of work and are then entirely divested of liability determines the amount of their fee. We would have had to come in, in the first place, to divest ourselves of liability, but since we are parties in the nature of interpleader rather than true in-

terpleader we have a continuing interest which must be met every time one of these intervention propositions comes along. Also we are necessarily parties to the appeal, the appeal having been taken against us, so we are put to expense there also, and to which we believe we are entitled to fees.

The Court: Then you would be entitled to a fee each time one of these people comes in and interpleads on a trust deed to pay it off.

Mr. Wallace: We would be entitled to the $2.50 reconveyance fee on the one hand.

The Court: I mean the particular attorney's fee, and so forth.

Mr. Wallace: I believe the amount of fees to which we will be ultimately entitled is dependent on the volume [Rep. Tr. p. 51, lines 1 to 25]:

of the work that has had to be done all the way down the line, including those particular factors.

The Court: In connection, however, with the matter of keeping those titles clear.

Mr. Wallace: That is correct.

The Court: Not in connection with this main controversy going on between the conservator and the committee and the association.

Mr. Wallace: Yes. I feel that we are equally involved there because if this act is constitutional and if the conservator shall ultimately prevail there are borrowers who have paid him who will be all in the clear, and those who have not paid him will be definitely in default and may very well lose their property.

On the other side of the picture, if the act is held to be unconstitutional those who have paid to the conser-

vator, if I may make one assumption which I trust will not be the case, that there is a deficiency in the amount of funds the conservator has, these people may be called upon by the association to pay again because they have at their own risk paid to a person who is managing under what has now been adjudged to be an invalid appointment. Such being the case, these people don't know to whom they are going to pay. Therefore it behooves their trustee to take such steps as it sees fit to affect a determination on the constitutionality of the act and to de-

[Rep. Tr. p. 52, lines 1 to 25]:

termine to whom these people should pay their money.

As far as the rights of the party appearing in the nature of interpleader is concerned, the case of Hunter v. Federal Life which I cited is very much in point.

The Court: I think that is right if you were the only one here or if you were the first one in here protecting these people's rights and others had come in. Then I think that might be true.

Mr. Wallace: I mean whether we are first or in the middle, your Honor. We may bring it in by way of an equitable defense as well as an original pleading. The case of Texas v. Florida is very definitely in point on that.

The Court: Yes, but what I mean to say is that the shareholders have three groups that are looking after them here, the shareholders' committee and you and—

Mr. Wallace: I have nothing to do with the shareholders, your Honor.

The Court: I thought you said the 8000 borrowers are shareholders.

Mr. Wallace: No, they are not shareholders. They are members.

The Court: You say your status is the same as a borrower.

Mr. Wallace: No, the borrowers are debtors of the association; the shareholders are creditors of the association.

[Rep. Tr. p. 53, lines 1 to 25]:

The Court: How can you both be members?

Mr. Wallace: Because the Federal Home Loan Bank Administration said so.

The Court: Are there two classes of membership?

Mr. Wallace: There are, your Honor.

Mr. Chapman: It is a mutual association, your Honor.

The Court: It is a mutual association?

Mr. Chapman: That is right.

The Court: All right.

Mr. Wallace: As was so aptly stated by the Circuit Court of Appeals:

"It would serve no useful purpose to discuss the sufficiency of the averments of the bill as a strict bill of interpleader, since it was clearly sufficient as a bill in the nature of interpleader which may be maintained by one who is not a mere stakeholder."

Then further on:

"The last contention of the appellant relates to the court's allowance of attorneys' fees to the plaintiff and the guardian ad litem. She asserts that the court was without power to make any allowances, and that the allowances were excessive. Since the court had jurisdiction of

the suit, there can be no question of its power to make [Rep. Tr. p. 54, lines 1 to 25]:

reasonable allowances for attorneys' fees."

And there are quite a number of cases along that line.

The Court: They didn't have to be in those lawsuits though, did they?

Mr. Wallace: They did unless they wanted to be sued by two people separately. As so many of the cases say, it is not only a question of whether or not there will be multitudinous liability, multitudinous vexation is sufficient.

The Court: Go on.

Mr. Wallace: I have little more to say, your Honor. The Government has shot almost nothing at me. They have made no claim of anything to our mind which was of any argument or of any consequence as far as the interpleader is concerned.

The Court: They haven't distinguished between any of you, have they?

Mr. Wallace: That is true, and I very frankly didn't think that I was even touched by the pellets which were shot in this charge of buckshot.

The Court: So you were sort of surprised?

Mr. Wallace: Very frankly, I was.

The Court: If you haven't anything more to offer, let me hear from Mr. Chapman.

Mr. Chapman: I think one reason, your Honor, that there are three different counts for the three different parties is the fact that there is a divergence of opinion. [Rep. Tr. p. 55, lines 1 to 25]:

I don't think that whatever the Supreme Court does in this case, including saying you should have dismissed it,

that that will end the case. It can't. We have a cross-claim in this action asking on behalf of the association, as distinguished from its shareholders, for trial of this issue on the merits, including the constitutionality of the law and including issues not presented by the shareholders. The Government chose, instead of moving to dismiss that also, to obtain time, to plead to that until after the three judges had ruled. That has never been before any court and is not now before the Supreme Court of the United States. That cannot be dismissed except by another action of the three judges.

The Court: Let me see. That is your suit of—

Mr. Chapman: That is our cross-claim against Ammann and Fahey on behalf of the association for what they did to us when they seized assets. That matter now has a motion to dismiss pending before your Honor, filed after the appeal, which supposedly has divested you of all jurisdiction, according to the contentions of the attorneys for Fahey and Ammann.

So my point is that regardless of the ruling of the United States Supreme Court, if they rule reversing everything that you and the three judges have done, that somebody has to rule on that motion to dismiss. It is not a matter that is before them now because the motion was made after the taking of the appeal. And I am far more [Rep. Tr. p. 56, lines 1 to 25]:

interested of course in the money that is in the registry of the court. So if everything that you have done is reversed, somebody has got to dispose of that $800,000 or $900,000, decide who is going to get it back, and that won't be done by the Supreme Court in the dismissal of the action, if they should do that.

I don't want to try to predict what any Supreme Court will do, but certainly there is a great deal of work undone. This is a partial judgment under Rule 54 of the Federal Rules, in so far as it passes on the constitutional points raised only by shareholders. True we joined in motions, but our cross-claim filed before your 3-judge ruling was not even replied to with a motion to dismiss until after the appeal.

The Court: You had that mimeographed, didn't you?

Mr. Chapman: We had so many of them, I think that is one that was mimeographed. It is part of the answer and cross-claim of the Long Beach Federal Savings and Loan.

Mr. Wallace: It was filed July 1st.

Mr. Chapman: The answer and cross-claim against Fahey and Ammann was not mimeographed. The third party complaint against the Federal Home Loan Bank was mimeographed.

The Court: Is that on appeal too, the third party complaint against the Federal Home Loan Bank?

Mr. Chapman: No, your Honor, it is not.

The Court: That is not involved in the present appeal?

Mr. Chapman: No, that is not involved in the present [Rep. Tr. p. 57, lines 1 to 25]:

appeal, and neither is the cross-claim against the same defendants Fahey and Ammann.

The Court: I think I have it now. This is the cross-claim of defendant Long Beach Federal Savings and Loan Association. Have you an extra copy of that typewritten list or printed list?

Mr. Westover: It isn't an extra copy, but you may have it.

The Court: All right. It is the answer to three things and their cross-claim?

Mr. Chapman: That is right.

Mr. Wallace: The cross-claim begins on page 17.

The Court: If the 3-judge decree is affirmed by the Supreme Court, that is the end of your cross-claim, isn't it?

Mr. Chapman: No, that establishes the constitutionality, or rather that establishes the unconstitutionality of Ammann's action. Now that is the law of the case. Such relief as we have asked for here as is different from that that is asked for by the shareholders, the court would then proceed to hear the motion of Fahey and Ammann to dismiss this cross-claim. If that were denied they would then have the opportunity to answer that cross-claim, and in so far as the relief is different than that already granted we would be entitled to it.

The Court: What different relief are you asking for than they are?

[Rep. Tr. p. 58, lines 1 to 25]:

Mr. Chapman: We are asking that we be restored, that there be an accounting with us—I really need to go through it to remember all we asked for, and we are going to want all of it when the time comes.

The point I make is that a reversal cannot dispose of that because it had not had a motion to dismiss put to it before the court ruled. So regardless of the ruling of the Supreme Court there is more work for this court to do whichever way the ruling comes.

The next point is the question of the money in the registry, that has to be disposed of by this court, in whose register the money is, so I think we are pretty well established at the point that the Supreme Court will not finally dispose of this case regardless of the ruling.

The next thing is what are we seeking to preserve. I think the best way to illustrate that is the contrast of the two administrations. We built it from $7500 to $26,000,000. They took it away from us and there was a surplus of $1,300,000 cumulated as the result of this terrible management that had to be thrown out. A small part of that surplus the management is asking to be allowed to fight on behalf of all shareholders to keep the association from going the way of the Los Angeles bank, in one day dissolved, liquidated and merged, apparently forever.

The record of the other side is a loss of $10,000,000 [Rep. Tr. p. 59, lines 1 to 25]:

in deposits in the first few weeks that they are in. They ask in view of that record that we not be allowed to have the use of even a tiny part of the money that this management earned over the twelve years for the shareholders.

Now the shareholders, whose money it is, and the management who earned $1,300,000 surplus, had carried this fight to the doors of the Supreme Court of the United States. We have been successful in the court below. The congressional investigating committee has made recommendations that Fahey and Ammann, the servants of the people, chose to ignore.

The Court: I cannot take into consideration any services rendered in connection with the congressional investigating committee.

Mr. Chapman: We haven't asked for it in this motion. I am merely showing how far we have been successful. There has been no application made in any of these applications for those services.

The Court: In fact, you have to get to the point in your argument that Mr. Wallace was. I was getting around to the time to put the same question to you.

Mr. Chapman: What have we done for the company?

The Court: No, not what you have done, but wouldn't you be here anyhow.

Mr. Chapman: We probably would be here, your Honor, but there is no doubt of whether we would be in the Supreme Court.

[Rep. Tr. p. 60, lines 1 to 25]:

Let's just imagine for a moment that your Honor denied these applications and let's suppose that counsel felt—I can assure you that I don't feel that way and that I am going to go on whatever happens—but let's imagine for a moment some other attorney was here and he said, "I worked on this thing day and night and have turned down my other practice, lost many thousands of dollars that way, I am not going to Washington to defend this association"—that doesn't exist, we are going—but let's assume for a moment that that did exist, and merely because of a default these gentlemen were successful. Nobody went, nobody defended the action, the judgment is reversed, it was decided they could merge, and off we go to Washington, San Francisco, Baltimore, in some kind of a merger. You can tell then whether we had done anything with the association or not.

While we are bearing the brunt and holding the fight and holding them off, it is very easy for them to deny,

"oh, we wouldn't hurt the association." Nobody held them off the Los Angeles bank. Where is it? That is the point here. Are we entitled to use money that the shareholders ask to have us have, money that this management earned for these shareholders, to hold off the people destroying the association, or aren't we? That is the question.

The Court: Let us not use those terms for the moment, "hold off the people that are destroying the association." Are you entitled to have this money out of the funds which belong, not to the conservator, the resistor, but which belong ultimately to the depositors and shareholders, are you entitled to have that reimbursed to you out of their funds now on deposit in this court for your services in presenting your ideas as to whether the defendants here are properly or not in possession? [Rep. Tr. p. 61, lines 1 to 25]:

Mr. Chapman: I think we are, your Honor. I think that is answered by the case of Eggert v. Pacific States Savings and Loan, which is cited in our points and authorities on the original motion, and cited again at length. That holds that the party who in good faith defends the association which was in the hands of the State Building and Loan Commissioner and loses the litigation was entitled to 5 per cent of the amount involved in the lawsuit which they lost.

We don't expect to lose this litigation—so far we haven't—but even if we should, the association and the officers are entitled to their defense on behalf of the shareholders and their money. We were elected to that job. For twelve years the people whose money it is reelected us every year to that job. They were satisfied with

the money we made for them and the surplus we accumulated and with the dividends we paid. They know of the Government's charges, they know of this action, they know of the whole situation, and their shareholders' committee, representing more than 50 per cent of [Rep. Tr. p. 62, lines 1 to 25]:

those shareholders, has joined with us in this fee application.

The Court: Let me see, the notice here was published, was it not?

Mr. Westover: Notice was published pursuant to your Honor's order.

The Court: It was published in the Journal?

Mr. Westover: It was published in the Journal and two Long Beach papers.

The Court: For how long?

Mr. Westover: One publication was all.

The Court: In each of them?

Mr. Westover: In each of them and in the Los Angeles Journal. I think your Honor set at least a date.

The Court: Was there notice in the public newspapers too concerning the application?

Mr. Westover: Yes.

The Court: Mr. Clerk, have there been any objections on the part of anyone filed?

The Clerk: No, your Honor.

The Court: Is there anyone now in the courtroom who has any objection other than the resistors? (No response.)

Mr. Chapman: We sort of expect them to object, your Honor. We are going to use the money against them.

The Court: I mean, is there anyone other than that who does object now? (No response.) There isn't any-

[Rep. Tr. p. 63, lines 1 to 25]:

body appearing in court, there has been no appearance of record, no letter or communication, telephone, telegram or any other communication, to this court objecting to the allowance of these fees.

Mr. Westover: I might say also, for the purpose of the record that so far as I know, no letters or communications objecting have been made to the shareholders' committee.

The Court: Let me ask Mr. Dougherty and Mr. Walker, have you received any objections by any of the shareholders or depositors?

Mr. Walker: None, your Honor.

The Court: Or borrowers?

Mr. Walker: We have had no communications of any kind.

The Court: No communications of any kind?

Mr. Walker: No.

Mr. Dougherty: No.

The Court: Nor Mr. Fahey's office?

Mr. Dougherty: No.

The Court: What do you call him now?

Mr. Dougherty: The commissioner.

The Court: Nor has the commissioner?

Mr. Dougherty: I couldn't speak for that?

The Court: You know of none?

Mr. Dougherty: I know of none.

[Rep. Tr. p. 64, lines 1 to 25]:

Mr. Chapman: I have heard of none, your Honor. I think in Long Beach, had there been any we would have heard it.

Mr. Wallace: I might say that I have heard many, many comments due to the fact that both advertisements have been noticed by individuals and have received entirely off-the-record notices of good wishes and felicitations, and so forth, along that line, statements to the general effect, both from borrowers and investors, that they would be delighted if the court saw fit to grant it.

Mr. Dougherty: I may call the court's attention, however, that the notices which were published did not indicate the amount of fees or costs which are requested.

Mr. Chapman: I think it sums itself up to this, your Honor, why can't the people use their own money to oust those who have trespassed upon them? That is really the question before you for decision at the moment. I don't think this stay—I haven't gone into it because other counsel have covered it and I think your Honor is satisfied with it—but why can't the people use their own money? Nobody is objecting to it except the people we want to use it against, and they want to protect the shareholders against the majority of their own shareholders apparently.

If this were an insolvent institution and we were dipping into somebody's savings we wouldn't be here making this application. This is an institution that has $1,300,000 in surplus.

[Rep. Tr. p. 65, lines 1 to 25]:

The Court: Yes, there has never at any time been any suggestion of insolvency on this institution by anybody in this record.

Mr. Chapman: There never was up to the time we lost it, I can assure you of that.

And one other point—I don't know that I should talk about Mr. Wallace's application, but I do want to bring this up—in the contract, in the deed of trust, your Honor

read paragraph 3, which provides that the attorneys' fees are a lien upon the property conveyed by the deed of trust. In our interventions the court had substituted the rights of all parties against the property to the money in the registry of the court.

The Court: Yes.

Mr. Chapman: It seems to me whatever power was given in that clause in the deed of trust against the real estate, which were the homes of these borrowers, now exists against the money in the registry. Speaking on behalf of the association and its management, we feel that the home owner and the borrower should not have to pay this out of his home. We feel it should follow the money that we expect and hope to come back to our association in the hands of the court. The service is a title service and is very necessary to the protection of the association and the shareholders despite the fact that the shareholders [Rep. Tr. p. 66, lines 1 to 25]:

have their separate counsel and their separate committee.

I don't see how the depositing shareholders, whose interests might be adverse to the borrower, could be expected to represent that party. We as the management and the board of directors have the duty of representing both the shareholders and the borrowers. We exercise that duty primarily in trying to protect the association itself. Unless these borrowers who have not yet intervened were represented by Title Service Company they would have no representation. If Title Service Company hadn't deposited the notes and deeds of trust and filed its bill in the nature of interpleader, the borrowers couldn't have intervened and cleared the title. He would have to wait until we were through, however many times we have to go to the Supreme Court of the United States.

The Court: Well, the borrower could have come in and forced the trustee into court, couldn't he?

Mr. Chapman: In that case the lien would have gone against the borrower's home under the contract in the deed of trust.

The Court: That is, the lien for the fees?

Mr. Chapman: That is right. That is a rather expensive remedy for the small home owner in litigation of this size.

We feel, on behalf of the management, that that is one of the burdens that should be borne by the funds and will [Rep. Tr. p. 67, lines 1 to 25]:
eventually reduce this $1,300,000 surplus somewhat. It is lucky we ran this prace up in twelve years to a big surplus and big deposits, because if that is the reward for building an institution up, it needs to be good and strong before it can stand this kind of an attack.

I don't think there is any question but what the court has the power. Whether your Honor wants to make the allowance or not is another matter.

The Court: If I have the power I think an allowance should be made because certainly there has been hard work and diligence on the part of counsel in this case.

Mr. Chapman: Thank you.

The Court: It has not only been diligent and hard work, but it has been effective work. The matter of the preparation of the pleadings and briefs has been exhaustive and has been very helpful to the court and has saved the court a lot of time and a lot of drudgery that

I would have had to go through in examining questions which have been very well put up.

I tried to make a list last night of all the things that were done here but I ran out when I got down to No. 12. And that is not counting the different interventions as far as separate parcels of property are concerned.

Very well. Have you concluded your statement?

Mr. Chapman: I have, your Honor.

[Rep. Tr. p. 68, lines 1 to 25]:

The Court: Do you wish to make some retort?

Mr. Dougherty: A very brief one, if your Honor please.

I fail to see, even assuming that this court has the power, as this court apparently has determined—

The Court: Yes, I think so, counsel. I think the stay is the execution and enforcement of the decree. Now I do not think that any of the things that are under consideration here are affecting or modifying the execution and enforcement of the decree.

Mr. Dougherty: We have here a stockholders derivative action problem. They are claiming fees for the protection of the shareholders, the stockholders. We have the management in here claiming fees for the same thing. The latest pronouncement of the Supreme Court of the United States relative to the characterization of a stockholders derivative action is rather interesting. In Koster v. Lumbermen's Mutual Casualty Company, decided March 10, 1947, they gave this definition in—

Mr. Westover: May we have the citation of it?

The Court: It is a pamphlet opinion.

Mr. Dougherty: The court said:

"The stockholder's derivative action, to which this policyholder's action is analogous, is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty by corpo-

[Rep. Tr. p. 69, lines 1 to 25]:

rate managers. Usually the wrongdoing officers also possess the control which enables them to suppress any effort by the corporate entity to remedy such wrongs. Equity therefore traditionally entertains the derivative or secondary action by which a single stockholder may sue in the corporation's right when he shows that the corporation on proper demand has refused to pursue a remedy, or shows facts that demonstrate the futility of such a request. With possible rare exceptions, these actions involve only issues of state law and, as in the present case, can get into Federal courts only by reason of diversity in citizenship of the parties. Their existence and peculiar character were recognized by this court in the old equity rules. Rule 27, 226 U. S. App. page 8. The complexities and unique features of these actions, however, are relevant to the forum non conveniens issue, for in these, as in all other petitions for equitable relief, he who seeks equity must do equity, and the court will be alert to see that its peculiar remedial process is in no way abused."

I merely bring this to your Honor's attention in connection with the one thing: Here are three groups who are now for the purpose of securing fees relying upon

[Rep. Tr. p. 70, lines 1 to 25]:

the technical pleadings and manner in which this case has

been brought into court to justify the payment of fees to the three groups. I may say that their work has been very close together, but I think that if one group is representing the members of this association and is therefore entitled to fees, that the others cannot under accepted principles of equity come in and recover.

That is all I wish to say at this time.

The Court: Either that or if there is one fee allowed and the parties might divide it between themselves as they saw fit. Do you think that can be done?

Mr. Dougherty: I have nothing to say on that, if your Honor please.

Mr. Westover: I might just in response to counsel's suggestion—I don't have it with me but I believe their own regulations, I believe it is Section 207.3, of the administration's regulations provide that the officers can do nothing once there has been a so-called conservator appointed. Therefore the officers found themselves with their hands tied instantly upon the seizure, unless they were going to engage themselves personally by physical action or contempt actions and things of that nature. Hence there was an absolute necessity at that time for different groups to come in and present the matter for the shareholder members would have been without protection under the regulations of the very department who now claim that we have no right to do it.

That is all I have to say, your Honor.

Charles E. Chapman
Attorney at Law
Ocean Center Building
Long Beach, California
Telephone: 619-02

In the District Court of the United States in and for the Southern District of California, Central Division.

Paul Mallonee, C. H. Newhouse, and Winnie Bucklin, Individually, and as Representatives of a Class, suing for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, an Association organized and existing under and by virtue of the laws of the United States of America, Plaintiffs, vs. John H. Fahey, individually, John H. Fahey as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, individually and A. V. Ammann, as the purported Conservator for the Long Beach Federal Savings and Loan Association, The Long Beach Federal Savings and Loan Association, Title Service Company, sued herein as John Doe One (Cross-Claimant in Interpleader), R. N. Wallis, sued herein as John Doe Two (Cross-Claimant in Interpleader), *et al.*, Defendants.

"Sub-Nominae."

Home Investment Company of Long Beach, a corporation, Intervenor, vs. Paul Mallonee, *et al.*, and John N. Fahey, *et al.*, Defendants in Intervention.

The Long Beach Federal Savings and Loan Association, Defendants and Third Party Plaintiffs, vs. Federal Home Loan Bank, *et al.*, Third Party Defendants.

Robert N. Wallis, Defendant and Third Party Plaintiff, vs. John H. Fahey, *et al.*, Third Party Defendants.

Title Service Company, a corporation, Defendant and Third Party Plaintiff, vs. John H. Fahey, *et al.*, Third Party Defendants.

Federal Home Loan Bank of Los Angeles, etc., Third Party Defendant and Cross-Complainant, vs. Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, *et al.*, Third Party Cross-Defendant. Civil File No. 5421 P. H.

REPLY OF LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION TO MOTIONS AND SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF RESISTANCE TO MOTIONS.

Defendants Fahey and Ammann have cited some 54 cases in their opposition to the granting of the allowances for fees. Not one of these decisions involves the seizure of a growing, prosperous, solvent institution with $1,300,000 surplus. The very statement that such an institution was seized is shocking. Cases dealing with resistance to liquidation of insolvent institutions, cases dealing with waste and dissipation of assets of wrecked institutions can have no application to this, the Long Beach Federal Savings and Loan Association case.

Whatever condition the institution may be in after the nine months' reign of the defendants, it was in such good condition when seized that it met over $10,000,000 (nearly 50%) withdrawals, within the first few weeks after it was seized. The issue of the defendants good faith and motives in making the seizure is squarely presented by the pleadings. The defendants Fahey and Ammann, are dipping into the Association and shareholders' assets at will for the payment of their own salaries, expenses, and any other matters which please their fancy, but in the

same breath seek to deny to the majority of the shareholders, *the actual owners of the money involved,* the use of a tiny fraction of their own money for the shareholders' fight to oust those who usurped and seized the solvent Association. *The money doesn't belong to Fahey and Ammann. It belongs to those who are asking the court to use but a tiny part of it for its own preservation.* The money in question was earned by the foresight and skill of the very officers and directors who seek the court's permission to use it to protect the Association. Those who built the institution from $7500 to $26,000,000 in twelve years, those whose judgment and business acumen paid continuous dividends from the date of organization to the date of the seizure and in addition accumulated a $1,300,000 surplus, seek the court's approval for the use of a tiny fraction of this surplus to complete their thus far successful efforts to oust those who unlawfully, by fraud and intimidation, seized the institution, and as contracted with the management's record, have lost more than $10,000,000, nearly one-half of the deposits, in the first weeks of their usurpation. They have discharged all of the old employees and in general have done everything possible to destroy the institution. The question to be decided is who has control of these funds, the court in whose Registry they are deposited or the usurpers who have seized control of the institution? Defendants Fahey and Ammann are seeking to prevent the court from allowing the people who own this money to use it to prevent its further dissipation by Fahey and Ammann.

Plaintiffs representing a majority of the Shareholder Members of the Long Beach Federal Savings and Loan Association, the Association itself and Title Service Company have filed motions and applications for an interim al-

lowance on account of fees aend expenses of litigation, which applications were verified and were supported by numerous affidavits. No counter affidavits or verified denials of any sort have been filed. Therefore, all factual matters stand admitted, the only questions presented by the resistance of the defendants Fahey and Ammann are those of law. The vitally determinative facts which should govern the court in its treatment of the application are:

1. Whose money is being affected?
2. Who is asking for the money?

and 3. Who is resisting the application?

THE MONEY INVOLVED DOES NOT BELONG TO FAHEY AND AMMANN. These are applications by the shareholders committee who represent a majority of the shareholders by the officers and directors of the Association who in twelve years of building up the institution from $7500 to $26,000,000 earned the $1,300,000 surplus and inspired the public confidence which created this sum of money, and by the Title Service Company, which as trustee of approximately $12,000,000 worth of deeds of trust is endeavoring to protect the 16,000 shareholder members and the 3600 borrowers whose savings and homes are at issue.

Resisting the application are Fahey and Ammann who, while they are denying to the owners of the money the use of any part of this, their own, money are at the same time dipping into it for all of their own salaries and expenses, dealing with it as they see fit, buying and selling securities, firing employees and generally acting as if they owned the institution. The applicants seek only an allowance on account for services already rendered in preserving the institution from destruction by these same defendants Fahey and Ammann who now resist the application

for fees. Defendants Fahey and Ammann at the outset attempt to intimidate this Honorable Court and the parties making the application by claiming that the application is a contempt of the Supreme Court. Needless to say, the authorities they cite do not support this position and the Stay Order itself completely refutes the position. THE ORDER ONLY STATE EXECUTION OR ENFORCEMENT OF THE DECREE ENTERED SEPTEMBER 30, 1946 BY THE HONORABLE THREE JUDGE STATUTORY COURT. The decree stayed does not contain one word from beginning to end having to do with these applications for attorneys' fees. Therefore, the Stay Order, (which stays only the matters in that decree), has no effect whatever on these fee applications. If defendants Fahey and Ammann's contention prevails, Rule 54(b) of the Federal Rules of Civil Procedure, adopted by the Supreme Court of the United States is but idle words. What possible use would there be to provide for judgments at various stages if the moment such a judgment is entered, and an appeal taken, all further proceedings instantly come to a complete halt? The language, of rule 54(b) "the action shall proceed as to the remaining claims" would then be meaningless.

Defendants Fahey and Ammann also claim that because an appeal has been taken by them from the decree of this Honorable Court entered September 30, 1946 that the court is powerless to consider the fee applications, in no way referred to or involved in the decree appealed from. Needless to say, the authorities they site do not support this position. They also raise the point that the one District judge cannot hear these applications, but that the three judges are required, ignoring completely the provisions of Title 28, Section 380(a) U. S. C. which only requires three judges for injunctive relief where constitu-

tionality of an Act of Congress is involved. The fee applications contain no injunctive matters and do not involve the validity of Acts of Congress. With all factual matters admitted by defendants Fahey and Ammann and all verified applications and affidavits of all three applicants admitted, the factual situation is such that a court of equity should certainly desire to grant the applications and would only ask whether it had the power to do so. The leading case and latest expression of the Supreme Court on this subject is: Sprague v. Fisconic National Bank, 307 U. S. 162, 82 L. Ed. 1184 U. S. Supreme Court (1939) which was an application for allowance on account of attorneys' fees on the part of a litigant suing a RECEIVER FOR A NATIONAL BANK.

All of the questions concerning public funds and public policy so much belabored by defendants Fahey and Ammann in their resistance, their points and authorities and supplemental points and authorities were decided adversely to them in this case. It is interesting to observe that the Fisconic Bank case was not a class action brought to benefit all similarly situated as is the present Long Beach Federal Savings and Loan Association case, neither did the judgment itself bring into court any funds not already in the hands of the National Bank receiver, but because of the binding effect of the judgment obtained, the Supreme Court of the United States reversed both the District Court and the Circuit Court of Appeals and *ordered the allowance of attorneys' fees* from other persons who had property in the hands of the National Bank receiver. These persons were not even parties to the appellants' litigation and the order was made against the receiver for the National Bank and against the funds in his, the receiver's possession.

Defendants lamely attempt to draw a distinction between a "conservator" and a "receiver," and proudly assert that they are not the officer of any court. This is in line with their whole theory that they are *beyond the reach of all courts.* The language used in the opinion in the Fisconic Bank case can well guide this court in its action on these pending fee applications. The court said in part:

> ". . . the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility. In the actual exercise of the power to award costs 'as between solicitor and client' all sorts of practical distinctions have been taken in distributing the costs of the burden of the litigation."

"Individualization in the exercise of a discretionary power" is required by all equitable principles of the present case. Applicants thus far have successfully resisted the attack of defendants Fahey and Ammann before a Congressional Investigating Committee of the Congress of the United States in Washington, D. C., before the Honorable Three Judge Statutory Court at Los Angeles, and have expended almost $18,000 in preparation of records, pleadings, documents, and other matters incidental to litigation of this magnitude, without including one dime of attorneys' fees. They have been successful at every stage of the proceedings thus far and because of the appeal

and last ditch resistance of defendants Fahey and Ammann by taking the matter to the U. S. Supreme Court, now these applicants ask but a tiny portion of their own money (an allowance from their own $1,300,000 surplus), so that they may be enabled to continue the fight to the bitter end, insisted upon by Fahey and Ammann. In deciding the question of whether or not this court has the power to pass on these applications during the pendency of the appeal, in the U. S. Supreme Court, the controlling question is, whether or not these matters were involved in the decree appealed from. If they were not, they are clearly within the power of the court.

The Supreme Court of the U. S. said in passing on a similar fee application in the Fisconic Bank Case, said:

> "We, therefore, hold that the issue in the instant case is sufficiently different from that presented by the ordinary questions regarding taxable costs that it was impliedly covered neither by the original decree nor by the mandates, and that neither constituted a bar to the disposal of the petition below on its merits."

If the fee application is so independent that it is "covered neither by the original decree nor by the mandates, and that neither constituted a bar to the disposal of the petition below on its merits," there is no reason why this court cannot immediately make the allowances asked for.

We must bear in mind the beneficial reform in federal procedure worked by the Rules of Civil Procedure, for District Courts, adopted by the U. S. Supreme Court in 1938. Rule 54 concerning Judgment: Costs, reads as follows:

(a) Definition, Form: Judgment as used in these rules includes a decree and any order from which an appeal lies . . .

(b) Judgment at Various Stages—When more than one claim for relief is presented in an action, the Court at any stage upon a determination of the issues material to a particular claim and all counter claims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of AND THE ACTION SHALL PROCEED AS TO THE REMAINING CLAIMS . . . (Emphasis added.)

The U. S. Supreme Court in the Fisconic Bank case said:

> "Finally, we must notice the separate ground taken by the Circuit Court of Appeals on the basis of what it deemed the requirements of terms of court. The new Rules of Civil Procedure have rendered anachronistic the technical niceties pertaining to terms of court as to both law and equity, but the ruling of the District Court here (170) in question was made prior to the operation of the new Rules. Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals—that it came after the end of the term at which the main decree was entered and therefore too late—falls."

It is, therefore, irrefutable that the fee application is "an independent proceeding and NOT A REQUEST FOR

MODIFICATION OF THE ORIGINAL DECREE. . . ." (Emphasis added.) This being so, "the action shall proceed as to the remaining claims." The contention of defendants Fahey and Ammann that because an appeal has been taken from an interlocutory decree, all further proceedings in the District Court must come to a full halt until the disposition of that appeal is refuted by their own actions in the proceedings. They have themselves filed answers and various motions since the taking of the appeal. The court has properly permitted dozens of intervenors to become parties to the action in order to clear the titles to their homes encumbered and entangled by the actions of these defendants Fahey and Ammann. Do said defendants contend that all this was also a "contempt" of the Supreme Court? If so, they participated actively therein and when to their advantage also filed motions.

BENEFITS TO ASSOCIATION AND SHAREHOLDERS.

Defendants Fahey and Ammann who despite the best efforts of the shareholders' committee and the directors and officers, have lost more than $10,000,000, nearly one-half of all of the deposits in the Association, who have discharged almost all of the loyal employees, have broken down the organization built up over twelve years, have shaken and undermined the public confidence in the institution, now have the effrontery to assert that the action of the shareholders committee and the directors and officers in resisting this destruction has been "of no benefit to the Association."

The $43,000,000 Federal Home Loan Bank of Los Angeles was seized, merged, and liquidated all in one day by these same defendants. *A Restraining Order obtained*

in this action at the time of the filing of the complaint and still continued in force to the very day of this application *is all that has saved the Long Beach Federal Savings and Loan Association from an identical fate,* and this is of "no benefit to the Association." By the action of these same defendants, the stockholders of the seized and liquidated Los Angeles Bank, without any consent on their (the stockholders) part, automatically became members and stockholders in another bank 500 miles away with strange officers and new directors, the assets and liabilities of which new bank were completely unknown to these involuntary stockholders! What would have happened to the Long Beach Federal Savings and Loan Association can, of course, be only a matter of conjecture. The defendants who in one day had disposed of the Los Angeles Bank were prevented by the Restraining Order from carrying out their purposes against the Long Beach Federal Savings and Loan Association.

Even with this prevention, they half way succeeded. Half of the deposits of the Association are gone. The Court Order of the Honorable Three-Judge Statutory Court at Los Angeles directing the return of the Association to those who in twelve years had built it from $7500 to $26,000,000, who had accumulated a $1,300,000 surplus and ordering the removal of those who in a few short weeks had lost $10,000,000 of deposits, had discharged the faithful employees, broken down the organization, undermined and impaired the public confidence, without which no financial institution can exist, this judgment removing the destroyers and returning the founders and builders, was according to Fahey and Ammann, "of no benefit to the Association."

It is significant that in the one day in which the judgment was in effect before defendants Fahey and Ammann could renew their attack upon the Association in the Supreme Court of the United States, more than $1,000,000 in new deposits were made in the Association by a few public spirited citizens who wished to assist in re-establishing public confidence, and upon the restoring of Fahey and Ammann to control every dollar of these deposits were immediately withdrawn. In the face of this defendants Fahey and Ammann say that the successful fight of the shareholder members and the Association was of "no benefit to the Association." On this line of reasoning, the only way to benefit an Association is to liquidate it. The benefit to the Association is not limited to the funds brought into the Registry of the Court. A far larger benefit was in the prevention of the merger, liquidation and destruction of the Association in a fashion similar to the merger and dissolution of the Los Angeles Bank. The very existence of the Association today hangs upon the eventual outcome of this litigation which Fahey and Ammann say is "of no benefit to the Association."

No Need for Three Judges on Fee Application.

Defendants Fahey and Ammann have misconstrued the nature of these fee applications and the kind of order prayed for. All of the applications are not only titled "interim applications" or "allowance on account", but throughout the body, and in the prayer they ask for only a temporary partial allowance sufficient to enable the applicants to continue in the United States Supreme Court, the matters they have, thus far successfully prosecuted in the Honorable three-judge statutory court. The applications seek relief similar to a preliminary allowance

upon account of counsel fees, costs, etc., in a divorce proceeding or in a probate proceeding, or in a guardianship matter. The very wording of Title 26, Section 792, U. S. C. A., refutes the contention which defendants attempt to place upon it. The last sentence reads:

"Provided, however, That any action of a single judge hereby permitted shall be subject to review at any time prior to final hearing by the court as constituted for final hearing, on application of any party or by order of such court or its own motion."

Unquestionably defendants Fahey and Ammann will continue to prolong and delay the litigation in every manner possible.

Numerous matters have taken place since the judgment entered by this Honorable Court, September 30, 1946, including numerous interventions, thousands of dollars in additional money has been deposited in the registry of the court. NOTICES HAVE BEEN MADE BY THESE VERY DEFENDANTS FAHEY AND AMMANN SINCE THE APPEAL WHICH WILL REQUIRE DISPOSITION REGARDLESS OF WHAT RULING IS GIVEN BY THE UNITED STATES SUPREME COURT.

A tremendous additional amount of work must of course, be done by all counsel in resisting the appeal to the United States Supreme Court and undoubtedly the additional intervenors attempting to clear their encumbered titles will have become even more numerous than at present.

The decisions cited by defendants which were decided prior to the enactment in 1938 of the Rules of Civil Procedure For District Courts including section 54(b) and

before the enactment in 1942 of Section 792, U. S. C. A., only confuse the question of the power and jurisdiction of this court under these enactments. The provisions of Title 28, Section 380(a), U. S. C. A., must never be forgotten; they are the parent legislation. 792 is merely a supplementary clarification. Section 360(a) requires a three judge court only when two factors coincide: (1) injunctive relief whether preliminary or permanent and (2) based upon unconstitutionality of an act of the United States Congress or of a law of one of the states. *Neither* of these requirements are met in any way by any of the fee applications. The only questions involved in the fee applications are the jurisdiction over funds physically in the registry and custody of the court, which jurisdiction is exercised in the preservation of the $26,000,000, of assets involved in this action. The exercise of this power by the Court is sought regardless of whether the Act of Congress is constitutional or unconstitutional and nothing remotely in the nature of a temporary or permanent injunction is sought by any of the fee applications. clearly within the power of one judge under Sections 380(a) and 792 U. S. C.

Final Success Not a Prerequisite for Allowance of Fees.

Defendants Fahey and Ammann have made much talk and cited many cases in their efforts to induce the court to postpone the allowance of fees until the final determination of the litigation at the end of the last appeal, well knowing that such delay will insure their victory. Not only in success immaterial as to the allowance of fees, but fees have been allowed to the directors and

officers of a seized Building and Loan Association for their attorneys WHO LOST THE LITIGATION. In

Eggert v. Pacific States Savings & Loan, District Court of Appeals, California (1942), 53 Cal. Appellate (2d) 554, 127 Pac. (2d) 999,

action was brought against Pacific States Savings and Loan Association by plaintiffs seeking to impose a trust upon assets transferred to Pacific States by Fidelity Savings and Loan Company. The directors of Pacific States defended the action through their attorneys O'Melveny and Myers. The Building and Loan Commissioner intervened, but as he had also previously seized Fidelity Savings and Loan and had now seized Pacific States, he could not sue himself or represent either side of the action. Pacific States lost the case, and the court ruled entirely in favor of the plaintiffs. The amount involved was approximately $750,000. The court allowed O'Melveny & Myers, attorneys for Pacific States Savings and Loan WHO LOST THE CASE, the sum of $36,270. (almost 5% of the sum involved) as fees and ordered the sum paid out of the Pacific States assets in the hands of the Building and Loan Commissioner. The Building and Loan Commissioner appealed from the order allowing the $36,270. in fees, on two grounds:

1. That the Superior Court was without jurisdiction to order the Building and Loan Commissioner to pay attorneys' fees of the officers and directors from the assets in the hands of the commissioner and

2. That the court had no authority in an action of this nature to fix or allow such attorneys' fees. The District Court of Appeals ruled against the Commissioner on both grounds. The trial court had found: "the above

entitled action was defended by Pacific States through its counsel of record, the firm of O'Melveny & Myers in good faith and on reasonable grounds." The court said, "In the present case appellant, as trustee of the assets of both Fidelity and Pacific States, found himself on both sides of the present litigation with conflicting interests. It was to the interest of Fidelity that plaintiff be successful. On the other hand, it was to the interest of Pacific States that respondent prevail."

In the Long Beach Federal case would it be expected that Fahey and Ammann would sue themselves to determine whether or not they were justified in their action in seizing the assets of Long Beach Federal Savings and Loan Association? Could it be expected that Fahey and Ammann would as conservator for the Long Beach Federal Savings and Loan Association sue themselves as liquidators of the Los Angeles Bank for assets, stock, bonds and deeds of trust in the Los Angeles Bank and belonging to the Long Beach Federal Savings and Loan Association? These matters were put in issue by the Third Party complaint against the Los Angeles Bank, the San Francisco Bank and the Portland Bank, involving tens of millions of dollars. Could the officers and directors have passively stood idle in the face of such seizure by Fahey and Ammann? The same rule cited in this case applies but in the Long Beach Federal Savings and Loan Association WE HAVE "NOT IN GOOD FAITH AND ON REASONABLE GROUNDS," LOST THE CASE. We have won and are defending our victory in the United States Supreme Court. Surely if one who loses a case can be paid *after losing it*, for his expenses in so doing, this court can allow the victorious Association and Shareholders' Commitee sufficient of their own money to continue their thus

far successful fight on through the Supreme Court of the United States. IF THE LOSER CAN RECOVER HIS FEES AFTER LOSING, THE WINNER CAN BE ALLOWED THE AMOUNTS NECESSARY TO PRESERVE HIS VICTORY.

There is another reason why these defendants are fighting so desperately against an allowance by this court on account of the expenditures already made and the services already rendered. In seeking a pretext to present to the public for making this seizure of the Long Beach Federal Savings and Loan Association without notice, without hearing, and without cause, in their desperation the defendants have fastened upon the appropriation of the $100,000 for the defense of the Association from this attack. When they made this pretext, in May of 1946, it looked safe to the defendants, but the present status of the case, this enormous file, the decree of the three-judge court, the action of the Congressional Committee, demonstrates not only that the $100,000 appropriation was justified, but that it was inadequate. The instant that this court makes a reasonable allowance for the work thus done, this pretext of the "enormous" $100,000 appropriation disappears, and with it goes the only justification that defendants could ever hope to have for making the seizure. This explains their attempt to intimidate this court and these parties by a mis-statement of the effect of the Stay Order issued by Justice Rutledge, and their efforts to delay the hearing of the applications for fees.

With the nearly $18,000 spent in costs and with this enormous file before him, no one could claim that the $100,000 was exorbitant. Therefore, the efforts of the defendants to prevent your Honor from making the fee ruling. The fixing of a reasonable amount of compensa-

tion by your Honor not only replenishes the almost empty war chest of the plaintiffs, but at the same time brands as false the defendants principal claim for justification of their seizure. The pretext which looked so safe last May, threatens now to engulf these defendants and their only hope is to prevent Your Honor from ruling on an allowance, notwithstanding that such allowance is justified.

THE ALLOWANCE OF THE APPLICATION IS NECESSARY TO PROTECT ASSETS IN THE CUSTODY OF THE COURT.

In order to preserve the institution as a going concern so that the judgment finally entered shall be effective, the defendants themselves are doing the very thing they object to the court doing. They are paying out assets and money as salaries to themselves and their deputies; they are selling securities, paying taxes, making loans, and generally dealing with the Association's money, securities and assets at their pleasure. Their so doing obviously interferes with the jurisdiction of the Supreme Court to an even greater extent than what the applications ask the court to do. In cases of this magnitude proportions must be observed. The real reason for the resistance from the defendants is that they seized this institution without cause, and without justification for the very purpose of preventing of the use of the institutions assets for its own defense. Because of such seizures, they do not hesitate to oust the Supreme Court of jurisdiction, by all of the acts enumerated, but they vociferously object to this court doing a tiny fraction of what they themselves have done. The awards to be made by this court on granting of the fee applications are not as much beyond the juris-

diction of the Supreme Court as are the bonds sold by the defendants, the salaries they have paid themselves, or the other expenditures totaling many thousands of dollars which they make from these same assets every month. The allowance of the application for fees is an act of the same character as the permitting of the interventions and the other acts the court has taken to preserve the assets. Even the Supreme Court has recognized the need for preservation of the assets in retaining the Restraining Order and Injunction Against Merger. The defense of that very Restraining Order Against Merger in the Supreme Court of the United States is the purpose for which this court is asked to make its allowance on account of fees. Regardless of the decision or final outcome of the action, with or without jurisdiction, with the Act constitutional or unconstitutional, the preservation of the $26,000,000 in assets is of necessity compelling an allowance of a fraction of 1% to these defending these same assets in the United States Supreme Court.

Involved in the action is the $26,000,000 in assets which defendant Ammann admits in his inventory that he seized when he took the Long Beach Federal Savings and Loan Association, 1% of $26,000,000 is $260,000, 1/2 of 1% is $130,000. Defendants Fahey and Ammann, so proud of their destruction of the association, will probably direct the Court's attention to the fact that there are $10,000,000 less in deposits now than when they took over and that there are many thousand fewer shareholders. This is undoubtedly true, but should the Court be thus dissuaded from making the allowances, defendants Fahey and Ammann would need only to completely succeed in destroying the institution, which would then have no shareholders and no assets and on this theory

could allow no fees. The real answer, of course, is that the allowance of fees comes out of the $1,300,000 surplus which defendants Fahey and Ammann have not yet succeeded in merging, dissolving or liquidating, at least so far as known to the public. This is the same surplus built up over the twelve years growth by those from whom Fahey and Ammann seized the association.

The facts of the Long Beach Federal Savings and Loan Association case are so shocking to the conscience and to equity as to require the interposing of extraordinary remedies. When the application is by those seeking to use their own money to expel a wrongful invasion, which invasion was made with the deliberate intent to destroy, and when the only resistance to the application is by the very invaders the applicants are successfully evicting, equity and fair play insist that the applicants should have the right to the use of their own money, notwithstanding, the invaders tenacious, last ditch resistance to every constitutional authority including the Congress of the United States and the United States Courts.

It is respectfully submitted that all applications should be granted and reasonable amounts to be fixed by the court allowed for reimbursement for the services and expenditures already made and to enable the fruitful completion of the matters as auspiciously begun and thus far successfully carried out.

Respectfully submitted,

/s/ CHARLES K. CHAPMAN

CHARLES K. CHAPMAN

Attorney for Defendant, Cross-Claimant and Third Party Plaintiff Long Beach Federal Savings and Loan Association.

Thomas and Wallace,
Attorneys for Title Service Company,
602 Jergins Trust Building,
Long Beach 7, California.
Telephone: 727-61

In the District Court of the United States in and for the Southern District of California, Central Division.

Paul Mallonee, C. H. Newhouse and Winnie Bucklin, individually and as Representatives of a Class, suing for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, an Association organized and existing under and by virtue of the laws of the United States of America, Plaintiffs, vs. John N. Fahey, individually, John N. Fahey as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, individually and A. V. Ammann, as the purported Conservator for the Long Beach Federal Savings and Loan Association, The Long Beach Federal Savings and Loan Association, Title Service Company sued herein as John Doe One (Cross-Claimant in Interpleader), R. N. Wallis, sued herein as John Doe Two (Cross-Claimant in Interpleader), *et al.*, Defendants.

"Sub Nominae"

Home Investment Company of Long Beach, a corporation, Intervenor, vs. Paul Mallonee, *et al.*, and John N. Fahey, *et al.*, Defendants in Intervention.

The Long Beach Federal Savings and Loan Association, Defendants and Third Party Plaintiffs, vs. Federal Home Loan Bank, *et al.*, Third Party Defendants.

Robert H. Wallis, Defendant and Third Party Plaintiff, vs. John N. Fahey, *et al.*, Third Party Defendants.

Title Service Company, a corporation, Defendant and Third Party Plaintiff, vs. John N. Fahey, *et al.*, Third Party Defendants.

Federal Home Loan Bank of Los Angeles, etc., Third Party Defendant and Cross-Complainant, vs. Federal Home Loan Bank of Portland, sometimes known as Federal Loan Bank of San Francisco, *et al.*, Third Party Cross-Defendant. Civil File No. 5241 F. N.

REPLY OF TITLE SERVICE COMPANY TO RESISTANCE TO MOTIONS AND SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF RESISTANCE TO MOTION.

Comes now Title Service Company and presents to the Court its Reply to Resistance to Motions and Supplemental Points and Authorities in Support of Resistance to Motions heretofore filed on behalf of the Defendant A. V. Ammann as follows:

I.

It is rather difficult for Title Service Company to reply to the "Resistance" by reason of the fact that the same is so general that it is almost impossible to determine what portion thereof, save a portion of one page in the "Supplemental Points and Authorities" is directed to it. It appears almost as though a charge of buckshot had been let go on behalf of the Defendant Ammannn with hopes that some of it might hit something. Since the Supplemental Points and Authorities not only encompass the whole of that covered by the Resistance but also supersede and extend beyond its scope, this Reply will deal only with the Supplemental Points and Authorities.

It appears from a most casual reading of the later document on its first page that it has been conceded that

this Court has a most definite right to entertain and pass upon the motions for fees. The quoted portion of the judgment of the reservation by the Court to pass upon and determine collateral issues would seem to be sufficient in itself. As will be hereinafter demonstrated it is clearly sufficient. The stay order issued by Mr. Justice Rutledge, by its own terms, sets its own limitation on the trial court only to an enforcement of its judgment with certain exceptions, i. e., by leaving the restraining order against merger, commingling, etc. effective. With that limitation, Rule 54(b) of the Federal Rules of Civil Procedure and 28 U. S. C., Section 792 leaves the trial court free to entertain and pass upon collateral matters.

II.

In considering the first point raised by the resistance there seems to be confusion as to what is meant by the "fund". It seems that the resistor thinks that the fund is limited to the money in the possession of the Court, whereas the "fund" contemplated by the cases cited by the moving parties is:

a. The funds prevented from being commingled, merged, etc., by the restraining order obtained by the plaintiffs;

or b. The property brought before the Court by the Title Service Company by its interpleader and bill in the nature of interpleader.

The reason for the bringing of the instant proceedings is to obtain an interim allowance of fees and expenses which will enable the plaintiffs and appellee defendants to repay themselves sufficiently to enable them to defend the pending appeal and thereby retain the benefits gained in the liti-

gation to date. It would indeed be a sorry situation to have obtained the relief heretofore granted and at this point to have to abandon the same for lack of the monetary wherewithal to carry on. Even were we to limit the consideration to the "fund" apparently contemplated, to wit; the money actually on deposit, even though the stay order, as stated by Ammann, enjoined him and Fahey, in their official capacities from making any claim thereto, the cases cited in support of the motions give the Court the right to make an award pendente lite, of counsel fees and expenses from the fund.

It is noted that none of the cases cited have been digested. A thorough reading of them by counsel indicates why, since none of them are sufficiently in point to support the contention. As an example is the case of:

Stockton v. Bishop, 43 U. S. 74, 11 L. Ed. 184 (1843)

which was a case wherein a writ of fieri facias was sought after the perfection of the appeal. Such a writ, to enforce the judgment appealed from, was of course beyond the jurisdiction of the trial court to issue pending the appeal, since it was the immediate issue of the case and not a collateral matter. The other cases are equally remote in point.

III.

The second point raised is that the taking of the appeal has divested this Court of authority during the pendency of the appeal. There is no argument with the general principle enunciated in all of the cases cited—that the taking of an appeal does divest the trial court of authority to do any act which is within the scope of the judg-

ment appealed from. However, there is nothing in any of these cases to preclude the Court from acting upon a matter which has not heretofore been passed upon and which is not involved in the judgment from which an appeal has been taken. Again, a case cited in the Resistance is:

> *Bronson v. LaCrosse & Milwaukee R. R. Co.*, 1 Wall. 405, 17 L. Ed. 616,

which does set forth the general rule of law and then goes on to hold that the trial court was well within its jurisdiction in allowing the payment of operating expenses of the railroad by the receiver while the appeal was pending.

The case of

> *Rogers v. Consolidated Rock Products Co.*, 114 F. (2d) 108,

was one in bankruptcy wherein an appeal was taken from a judgment approving a plan for reorganization. Thereafter a substitute plan was offered. The holding was that the trial court was without jurisdiction to entertain the new plan since the former plan had already been approved in the judgment appealed from and the new plan would have amounted to a modification of the judgment appealed from. Hence, the trial court was without jurisdiction.

No one of the cases cited is authority for the proposition as applied to the instant case, although counsel are to be commended for the deft way in which portions of opinions have been singled out and woven into their argument to make the same sound plausible.

IV.

The argument adduced that the motions for allowances of fees and expenses are in contempt of the Supreme Court is apparently brought forward in an attempt to intimidate the moving parties and possibly the Court. All of the cases cited in support of this position had to do with affirmative acts being committed by the contemnors in violation of some order of the court or acts which had been stayed by an appeal or the issuance of a writ of supersedeas. Now, it is here asked, can a contempt be committed by a motion to this Court? This position seems to be consonant with the position taken by the Defendants Fahey and Ammann that they alone can do no wrong and that no other party to the litigation has any rights whatsoever.

V.

It is next contended by the resistor that this Court, sitting alone, is without jurisdiction to determine the motions and is precluded from so doing by Section 792 of Title 28, U. S. C. In support of this contention the lone case of Trustees v. Greenough is cited, which was decided in 1881, long prior to the adoption of 54 (b), F. R.C.P. in 1938 and the enactment of Section 792, Title 28, U. S. C., in 1942. However, when Rule 54 (b), Federal Rules of Civil Procedure, is applied in the instant proceeding it is seen that the action is subject to judgments at various stages of the proceedings and it is respectfully submitted that Section 792 applies only when the judgment is injunctive in its nature and requires a hearing before three judges pursuant to the provisions of Section 380 (a). The allowance of fees for counsel is purely a *pendente lite* matter and does not require the ac-

tion of three judges any more than does the allowance of an appeal. In the only case noted in U. S. C. R. under Section 792 approves the allowing of an appeal by one judge in U. S. v. Hancock Truck Lines, 304 U. S. 774.

It is interesting to note that in the quotation from Section 792 that the last portion of the section was omitted. That portion contains a proviso which may be highly important here which is:

> "Provided, however, that any action of a single judge hereby permitted is subject to review at any time prior to final hearing by the court as constituted for final hearing on application of any party or by order of such court or on its own motion."

In view of this proviso it is submitted that even if the hearing on the motions for counsel fees and expenses is within the purview of Section 792, which is not admitted, then the proviso above quoted allows a single judge to pass upon the matter.

VI.

The next contention of the resistor is that no costs, fees or expenses are payable until plaintiffs have finally been successful in their litigation.

It is first pointed out by Title Service Company that the statement has no application to it. The rules with reference to such allowance for interpleaders are entirely different. Since this subject has been covered in the points and authorities in support of the motion it will not be repeated, other than to say that this Court may allow fees to the interpleader at any stage of the proceedings.

However, let it not be assumed that the interpleading Title Service Company concurs with the position taken

by the resistor. The point attempted to be raised is too important to be passed over lightly. Again the resistor is apparently attempting to impress the Court that since he claims to be an arm of the government that he is immune to the jurisdiction of the Federal Courts. He points out that he was appointed pursuant to a federal statute and not under an appointment by the Court. The question is again posed:

> When did an enactment by a commissioner of a governmental agency assume the status of an Act of Congress and deprive a Federal Court of jurisdiction?

Although it is true that the statute, Section 5(d) of the Home Owner's Loan Act, does provide for the appointment of a conservator, that statute is meaningless in its enacted form and requires further legislation to become effective and since it places no limit to the adopting power in the formulation of, such legislation, it is unconstitutional. Verily, as stated by the resistor, the protection of public funds is involved. It is essential that they be protected by the courts from the unwarranted and arbitrary acts of the Defendants Fahey and Ammann, and it was to afford protection to some 8000 borrowers and the titles to their property that it was deemed necessary to bring the interpleader proceedings.

It is interesting to note the reliance placed upon the case of: *Sprague v. Ticonic National Bank*, 307 U. S. 161, 83 L. Ed. 1134.

The statement made on page 12, lines 25 to 27, of the Resistor's Supplemental Points and Authorities is a complete misstatement of the facts of the case in its state-

ment that "the mandate which brought the case to a successful conclusion for the claimants had come down from the Supreme Court before the motion for costs was filed." A reading of the first page of the decision shows the contrary and a checking of the history of the Sprague cases discloses that the action was filed on February 18, 1938 and the mandate from the Supreme Court was not handed down until April 11, 1938. The Sprague case is very definitely authority for the fact that it is not necessary to await the final disposition of a case before the making of an allowance for fees and expenses. In that case the trial court, affirmed by the Circuit Court of Appeals, held that it could not award fees because the case in chief was on appeal to the United States Supreme Court when the motion was filed. However, in reversing both of the lower courts the Supreme Court held through Mr. Justice Frankfurter that the mandate did not cover fees and expenses and was not controlling, and, therefore, that the trial court should have considered the motion for fees and directed it so to do.

VII.

As to the contention raised by the resistor that it is the duty of the lower court to preserve the fund paid into its registry pending the appeal, it is again brought to the Court's attention that as to interpleaders courts of equity have, from time immemorial, been allowed payment of their expenses and fees from the fund paid into the Court. In support of this point see:

New York Life Insurance Co. v. Miller, 139 F. (2d) 657 (1944), which is one of the latest judicial expositions on the subject and also covers the point that it matters

not whether the action be originally begun as an interpleader or whether the same be interposed as a cross-claim as in the case now at bar.

VIII.

Under his point VII the resistor seeks to show that where an action is not brought to recover or preserve funds an attorney's fee is not allowable therefrom, and, after the citation of numerous cases which have no bearing at all on the instant facts attempts to argue that the moving parties now before the Court not only did not act to preserve the funds but by their acts have injured the owners of such funds.

As to the plaintiffs in the action, and the officers and directors of the Association, and their respective counsel, it is not incumbent upon Title Service to remark, but it cannot be passed without the observation that in the light of what had happened to the Federal Home Loan Bank of Los Angeles and its assets, which bank was summarily and without notice dissolved and the assets of which were merged with those of another bank which was contemporaneously dissolved and merged with another bank which had not theretofore existed but which was also contemporaneously created that without the protection of this Court that the assets of the Long Beach Federal Savings and Loan Association would have gone the same woeful way. With the protection of this Court those depositors who have chosen to leave their funds on deposit still know where they are and those who chose to withdraw upwards of $11,000,000.00 had the satisfaction of having the funds from which to make such withdrawals maintained.

The duties cast upon Title Service Company, as trustee, under its deeds of trust, made it mandatory upon it to take the steps which it did. Being faced, as it was, with the conflicting demands of the Defendant Ammann, on the one hand, and of the plaintiffs, evidenced by being brought into the action through the process of this court, and of the officers and directors of the Association, evidenced by their demand that it not recognize the authority of said Ammann, on the other hand, it had no alternative than to do as it did, and place the whole matter before this Court by interpleading the physical evidences of indebtedness and the security therefor which had been thrust upon it, in interpleader, and by bringing before the Court, by bill in the nature of interpleader, the other evidences of indebtedness and the security for them. Had it not done so, the borrowers, whose trust it had accepted, would have been placed in double jeopardy as to their property and faced with the perilous election of to which party to the litigation they should pay.

If the resistor were qualified for his position as conservator he would have sufficient knowledge of the customs and usage in real estate transactions in California to know that no marketable title to real property could have been obtained after the seizure, that no title insurance company would have issued its policy of title insurance predicated upon a request for reconveyance executed by him alone, even if such reconveyance were issued. Therefore, neither the interpleader cross-claim nor the recording of the lis pendens worked any further hardship upon borrowers. That without the interposition of the Lis Pendens which placed the whole world on notice of the acts of the defendant Ammann and his superior, the defendant Fahey, the borrowers would have had no protection from

the acts of these defendants in assigning trust deeds and promissory notes to all and sundry, as it has come to the attention of the trustee, and its counsel, that assignments of great numbers of trust deeds and notes have been made by the purported conservator. It may well be that these securities have been further reassigned. By the recording of the Lis Pendens, such borrowers, and those third persons dealing with them, have been placed upon notice. Such parties are now protected and can demand a proper application of their payments upon their obligations. Had not Title Service Company taken the steps which it did, no one can know what the end result might have been.

IX.

The final position taken by the resistor is that fees, costs and expenses are not payable from a fund in court unless there is an express or implied contract for the payment. A reading of all of the cases cited under this point indicate that the resistor is not grasping at straws that he elects to cite cases for the possible isolated bits of language which can be plucked from them. The cases of *Williamson v. Los Angeles District Flood Control District* and *Hubbard v. Camperdown Mills* show this. The former case was one wherein the actual litigation had been successfully carried on by the County of Los Angeles. Petitioner had brought three separate proceedings, none of which had been successful, asked for fees and was most logically denied them. The latter case was one wherein a minority group of stockholders had sought to block the majority in the sale of a portion of the assets of a corporation and had later joined in an agreement for a sale of the whole of the assets and liquidation; the sale had not provided sufficient to pay off the indebtedness and the minority group sought fees which were denied. Neither

case is remotely comparable with that one now before the Court—neither are the other cases cited in support of this point.

However, since point No. VII makes no specific reference to the motion of Title Service Company, it was probably not directed to it.

Although counsel for Title Service Company has taken the time to read all of the citations set forth by the resistor, the same have not been digested, individually, in this Reply. Sample cases have been digested to demonstrate to the Court how far afield the resistor has gone in endeavoring to build up a showing before the Court. Since most of the "resistance" appears to have been directed at the other moving parties, although it has not been segregated as to parties against whom it was directed but has, instead, been accumulated into a single, broad and sweeping attack upon all, this party assumes that one of the other moving parties against whom it may be assumed to have been more specifically directed will digest those citations in detail. Therefore, in the interest of conserving the time of the Court, a detailed analysis of these citations is not made herein.

The attention of the Court is invited to the fact that there has been no factual denial of any of the subject matter of the motions. Hence, the facts as set forth in the motions themselves go undenied and are consequently admitted.

Conclusion.

In concluding this Reply it is earnestly urged upon the Court's attention that no authority has been brought forward by the resistor having to do with the denial of the right of this Court to award attorneys' fees and expenses to Title Service Company, by reason of its Cross-Claim in Interpleader and in the Nature of Interpleader filed herein and the services rendered in connection therewith, with the possible exception of the claimed lack of jurisdiction by reason of the stay of execution issued by the Supreme Court and the pendency of the appeal. It is respectfully submitted that the stay of execution went no further than to preclude the enforcement of the judgment, and by mandatory order, to reinstate the conservator. Such order in no wise affected the right of this Court to inquire into collateral matters such as the award of fees and expenses.

Although the taking of the appeal by the Defendants Fahey and Ammann had the effect of divesting this Court of power to proceed further as to the matters severed by the judgment and made the subject matter of the appeal, under the provisions of Rule 54(b) Federal Rules of Civil Procedure this Court has ample power to hear and determine a strictly collateral matter and since no injunctive relief is sought and no attack is made by the fee applications upon the constitutionality of any Act of Congress the provisions of Section 380(a) of Title 28 U. S. C. A. have no application nor does Section 792 of the same Title. Regardless of what the decision may be on the

pending appeal the mandate of the Supreme Court thereon can have no bearing on any award of fees and expenses which may be made as a result of the motions now pending.

This Court has the inherent jurisdiction in its equity arm to entertain and act upon the motions for allowances of attorneys fees and expenses and no valid reason has been adduced as to why it should not hear and determine the same. Counsel for this moving party is not intimidated by any suggestions of contempt since no contempt can be committed in the presentation of a motion to this Honorable Court such as that now pending. The motion is presented in good faith and for the protection of the borrowers. For the protection of the assets of the borrowers from the Long Beach Federal Savings and Loan Association an allowance of counsel fees and expenses incurred to date should be allowed.

By the terms of said Deeds of Trust, counsel fees for the trustees are made a lien upon the properties conveyed by the Deeds of Trust. This lien follows the funds into the Registry of the Court, which by virtue of the order permitting the substitution of the money for the property "preserved the rights of all parties." The fund which exists in the registry of the Court would not be there for protection, except for the efforts of all applicants for fees.

Respectfully submitted,

THOMAS AND WALLACE

By /s/ H. O. Wallace

H. O. WALLACE

Attorneys for Title Service Company.

FILE COPY

Supreme Court
FILED
APR 29 194
CHARLES ELMORE

No. 133 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1946

EX PARTE JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION

IN THE MATTER OF THE PETITION OF JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONERS

FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

v.

THE HONORABLE PEIRSON M. HALL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND THE CLERK AND OTHER OFFICERS OF SAID COURT.

MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

INDEX

	Page
Introduction	1
Argument	2
I. The pendency of the appeal in No. 687, and this Court's stay order, deprived the district court of power to award counsel fees or expenses	3
A. The stay	3
B. Pendency of the appeal	5
II. Counsel fees and expenses in a derivative shareholders' suit are allowable only if the association ultimately benefits from the action and the plaintiffs are finally successful	10
A. Fees in shareholders' suits	10
1. The established rule	11
2. Movants' authorities	13
B. Nature of the fund in the district court's registry	20
III. The writ requested by petitioners should issue as an incident to the disposition of the appeal in No. 687	22
Conclusions	24

CITATIONS

Cases:

Adams v. *United States ex rel. McCann*, 317 U. S. 269	22
Bronson v. *La Crosse & Milwaukee R. R. Co.*, 1 Wall. 405	6
Buford v. *Tobacco Growers' Co-op. Assn.*, 42 F. 2d 791	17
Central Trust Co. of New York v. *United States Light & Heating Co.*, 233 Fed. 420	17
Colley v. *Wolcott*, 187 Fed. 595	17, 18
Cowdry v. *Galveston R. R. Co.*, 93 U. S. 352	15
Dickinson v. *Rinke*, 132 F. 2d 884	8
Draper v. *Davis*, 102 U. S. 370	4
Eggert v. *Pacific States Savings & Loan Co.*, 53 Cal. App. 2d 554	16
Equitable Trust Co. v. *Western Pacific Ry. Co.*, 236 Fed. 814	17
Goddard v. *Ordway*, 94 U. S. 672	6
Hammett v. *Ruby Lee Minar, Inc.*, 53 F. 2d 144	18
Harrison v. *Perea*, 168 U. S. 311	15
Hauenstein v. *Lynham*, 100 U. S. 483	22
Hobbs v. *McLean*, 117 U. S. 567	10, 11
Keyser v. *Farr*, 105 U. S. 265	5
McArthur v. *The John McArthur Co.*, 39 Cal. App. 704	10
McCourt v. *Singers-Bigger*, 145 Fed. 103	10

Cases—Continued Page

Minar, Ruby Lee Inc. v. *Hammett*, 53 F. 2d 149 18
National Labor Relations Board, In re., 304 U. S. 486 22
Pacific Coast Building-Loan Assn., In re., 15 Cal. 2d 155 .. 17
The People v. *Holten*, 304 Ill. 394 13
Republic of Peru, Ex parte, 318 U. S. 578 ..... 22, 23
Roche v. *Evaporated Milk Assn.*, 319 U. S. 21 22
Sprague v. *Picher*, 23 F. Supp. 59 14
Sprague v. *Ticonic National Bank*, 307 U. S. 161 ..... 10, 14, 15
Stockton v. *Bishop*, 2 How. 74 4
Trustees v. *Greenough*, 105 U. S. 527 ..... 9, 10, 13, 14
United States, Ex parte, 319 U. S. 730 22
United States v. *Shipp*, 203 U. S. 563 5
Wallace v. *Fiske*, 80 F. 2d 897 17
Warren v. *Palmer*, 310 U. S. 132 19
Winslow v. *Harold G. Ferguson Corp.*, 25 Cal. 2d 274 ..... 10, 12, 15, 16

Statutes:
Act of April 6, 1942, c. 210, § 3, 56 Stat. 198, 28 U. S. C. Supp. V, 792 9
Home Owners' Loan Act:
Sec. 5 (d) 4

Miscellaneous:
14 Am. Jur., p. 47 11
49 A. L. R. 1150–1151, 1190, 1166 ..... 11, 18
107 A. L. R. 750 ..... 11, 18
13 Fletcher, *Cyclopedia of the Law of Private Corporations* (1943 ed.), Sec. 6045, pp. 453, 456, 458, 459 10
Hornstein, *The Counsel Fee in Stockholder's Derivative Suits* (1939), 39 Col. L. Rev. 784, 786, 789, 790, 793–794, 798, 806 ..... 10, 12, 13

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 133 Misc.

EX PARTE JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION

IN THE MATTER OF THE PETITION OF JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONERS

FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

v.

THE HONORABLE PEIRSON M. HALL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND THE CLERK AND OTHER OFFICERS OF SAID COURT

MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

INTRODUCTION

The facts and circumstances upon which the petition for a writ of mandamus and/or prohi-

bition and/or injunction rests are set forth in paragraphs 1 through 9 thereof (Pet. 4–10), and will not be repeated here.

On April 14, 1947, this Court ordered a rule to show cause to issue, returnable April 28, 1947, requiring respondents to show cause why leave to file the petition should not be granted, and meanwhile stayed all further proceedings in the District Court to effectuate an award of counsel fees and expenses.

The present memorandum supplements and supersedes the discussion contained in the latter part of the petition (Pet. 10–19), and presents the reasons why, in our view, leave to file the petition should be granted, and the necessary relief accorded petitioners.

ARGUMENT

The short of petitioners' position is that Judge Hall, the respondent, remains without authority to award counsel fees and expenses[1] so long as this Court is seized of No. 687, and that such an award cannot properly be made at all, except possibly if the decree of the District Court in No. 687 is affirmed in its major aspects and petitioner Ammann ousted as Conservator of the Long Beach Federal Savings and Loan Association.

[1] For the sake of brevity, we shall sometimes refer to an allowance of counsel fees as including both the counsel fees and the other litigation expenses (other than normal court costs) requested by the movants below.

I

THE PENDENCY OF THE APPEAL IN NO 687, AND THIS COURT'S STAY ORDER, DEPRIVED THE DISTRICT COURT OF POWER TO AWARD COUNSEL FEES OR EXPENSES

A. *The Stay:* The judgment of the three-judge District Court, now on appeal in No. 687, provided that neither petitioner herein, individually or in his representative capacity, has any right, title, interest, or claim to the properties interpleaded and deposited in the registry of the District Court, or to any of the other assets or properties of Long Beach Federal Savings and Loan Association (Record in No. 687, R. 499). The decree also enjoins petitioners, individually and in their representative capacities, from ever asserting any right, title, or interest in these properties (Record in No. 687, R. 499). Further, the decree reserved to the District Court, "the right to make such other and further orders herein as shall hereafter be necessary to determine collateral issues hereto and to give to this Decree full force and effect" (Record in No. 687, R. 499–500). The stay granted by Mr. Justice Rutledge on October 1, 1946, and confirmed by the Court on December 9, 1946, stayed the execution and enforcement of the *entire decree* entered by the District Court (except to the extent that the decree restrains a merger, consolidation, or commingling of the Association, or its assets, with any other association).

Accordingly, this Court's order stayed the execution and enforcement of (a) the District Court's determination that petitioners have no claim to the Association's property, including the funds in that court's registry, and also of (b) that portion of the decree reserving to the District Court the "right to make such other and further orders herein as shall hereafter be necessary to determine collateral issues hereto and to give to this Decree full force and effect." By implication, the stay also superseded for the appeal period the lower court's finding that Section 5 (d) of the Home Owners' Loan Act was invalid. The judgment to be entered upon the granting of the motions for counsel fees would, however, necessarily have to rest on both of these provisions of the superseded decree, as well as upon the court's conclusion of unconstitutionality. Appellees in No. 687 and their counsel strongly urged the District Court's reservation of power in the decree as basis for favorable action on their motions (Closing Statement of Plaintiffs In Reply to Resistance, Instant Record, R. 148), and they repeatedly referred to the three-judge court's opinion as binding and effective.

It follows that the respondent District Judge was without authority to grant the motions or enter judgment for counsel fees, since this Court's stay order deprived the lower court of power to execute or enforce its decree in any way. *Stockton* v. *Bishop,* 2 How. 74; *Draper* v. *Davis,* 102

U. S. 370, 371; *Keyser* v. *Farr*, 105 U. S. 265, 266. The purpose of the stay herein, as of all similar stays, was to maintain the subject of the action, including the effectiveness of the statute, in *statu quo* until the final determination of the appeal to this Court, so that appellants in No. 687 (petitioners herein) would not lose the fruits of a meritorious appeal. Cf. *United States* v. *Shipp*, 203 U. S. 563, 573. The lower court's award of fees, pursuant to the original decree, would have precisely the effect of partially depriving petitioners of the results of a successful appeal in No. 687.

B. *Pendency of the appeal:* Probable jurisdiction of this cause, after proper appeal taken, was noted by this Court on December 9, 1946. The pendency of this appeal automatically suspends the power of the District Court to dispose of the funds in its registry for the purpose of compensating counsel or reimbursing the expenses of the adversary parties to the main litigation. This is so, because success for appellants in No. 687 will lead to dismissal of the entire action, and the sums in the District Court's registry will be forthwith turned over to the Association (acting through the Conservator). For the District Court to disburse part of the fund for fees and expenses, before this Court has had the opportunity to determine its proper disposition, would strike at the inherent power of this Court to render its decisions effective and its appellate jurisdiction efficacious. For

this reason, the established rule requires lower courts, having custody of a disputed fund, to preserve that fund pending appeal, and not to appropriate any part of it for any purpose other than preservation. In *Bronson* v. *La Crosse & Milwaukee R. R. Co.*, 1 Wall. 405, this Court said (p. 410):

> To guard against misconstruction in respect to the powers of a court having jurisdiction over the subject-matter, and where a decree has been rendered affecting the property in litigation—the road in this case—and an appeal is taken to this court, as the property in controversy is not brought into the appellate tribunal, but remains in the custody and care of the court below, it is agreed that *full power exists in that court, pending the appeal, to adopt all proper and judicious measures to protect and preserve it from waste or loss.* For this reason there can be no well-founded objection in the present case to the running of the road, and the reasonable application and expenditure of its revenues for that purpose. *Beyond this, any appropriation of the revenues is not warranted. They should be reserved for such disposition as may be directed by the final decree in the cause.* [Italics supplied.]

And in *Goddard* v. *Ordway*, 94 U. S. 672, the Court said (p. 673):

> While the court below may make the necessary orders to preserve the fund, and

> direct its receiver to that extent, *it cannot place the money beyond the control of any decree that may be made here, for that would be to defeat our jurisdiction.* [Italics supplied.]

In the lower court, the movants sought to argue that these awards of counsel fees and expenses were "administrative expenses" necessary to preserve the fund in the court's custody from "waste" or "loss." This is obviously a complete distortion of the principle referred to above. In speaking of proper measures to protect and preserve a fund from waste and loss, the Court was merely describing the financial, investment, and custodial measures necessary to maintain the corpus and normal income of the fund, pending the determination of the appeal; authority to disburse part of the fund, during the pendency of the appeal, for the litigation expenses of one of the adversary parties can hardly be inferred from a direction to protect and preserve the fund from waste or loss during the appeal period. Moreover, the fund will not be "wasted" or "lost" if appellants in No. 687 prevail, although the movants have striven to leave that erroneous impression. In the event that the Government succeeds, the funds will continue to be part of the assets of the Long Beach Federal Savings and Loan Association and will be administered for its benefit and the benefit of its shareholders. All concede that the funds

belong to the Association; the sole controversy is whether the old management or the Conservator is now the legal management of the Association and its property. The fund will not be lost to the Association whichever way that issue is ultimately decided.

The case of *Dickinson* v. *Rinke*, 132 F. 2d 884, arising in the Second Circuit, well illustrates the general rule that an appeal deprives the lower court of jurisdiction to act. That case pertained to the district court's jurisdiction to make an ancillary order while an appeal from the judgment dismissing the complaint was pending. The main action, which was one for discovery and accounting of shares of stock, was dismissed, but the lower court, after appeal taken, punished certain parties by contempt proceedings for removing a large portion of the disputed shares from the court's jurisdiction. The Circuit Court of Appeals held that this order was "void because it was entered while the District Court had no jurisdiction of the proceedings." The court said (p. 885):

> The order imposing the fines, from which the appeal has been taken, was clearly an ancillary order in the main action brought by Dickinson, entered to compensate the latter for expenses incurred through the removal of the 244,041 shares of stock from the Southern District. Before it was entered, the appeal from the judgment dismissing the complaint had been perfected. * * * Here, after an appeal

> was taken from a final judgment in the suit, the District Court held further hearings and sought to exercise its discretion in an ancillary matter as to which it had deliberately reserved judgment pending the determination of the merits in the main action. Such a practice would entail serious inconvenience in splitting up for purposes of appeal matters which should come up on a single record. Because an appeal had been taken in the main action, the District Court was without jurisdiction to enter the order of August 25, 1942.

In that case, the jurisdiction of the lower court was denied even though, unlike the instant case, judgment on the particular ancillary matter had been expressly reserved, and property in the hands of the court was not involved.[2]

---

[2] It is also doubtful whether a single judge would be authorized to award counsel fees and expenses. The Act of April 6, 1942, c. 210, Sec. 3, 56 Stat. 198, 199, 28 U. S. C. Supp. V, 792 provides in part:

"In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for interlocutory injunction and for the final hearing * * * any one of such three judges may perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not * * * enter a summary or final judgment on all or any part of the action."

Under *Trustees* v. *Greenough*, 105 U. S. 527, an award of counsel fees and expenses is a "final judgment" for appeal purposes, and it would seem equally final for the purposes of the 1942 Act.

II

COUNSEL FEES AND EXPENSES IN A DERIVATIVE SHAREHOLDERS' SUIT ARE ALLOWABLE ONLY IF THE ASSOCIATION ULTIMATELY BENEFITS FROM THE ACTION AND THE PLAINTIFFS ARE FINALLY SUCCESSFUL

A. *Fees in Shareholders' Suits:* The plaintiffs' action in No. 687 is simply a derivative shareholders' suit brought by certain shareholders on behalf of the Long Beach Federal Savings and Loan Association against the present petitioners. In such actions, the general American rule denying litigation expenses is not applied, and attorneys' fees are allowable if, *but only if,* the corporation or association has benefited from the action, and when it is clear that the plaintiffs have finally been successful. Ultimate failure in the action precludes any allowance of counsel fees, as the authorities and practice universally prove. *Hobbs* v. *McLean,* 117 U. S. 567, 582; *Trustees* v. *Greenough,* 105 U. S. 527, 534; *Sprague* v. *Ticonic National Bank,* 307 U. S. 161; *McCourt* v. *Singers-Bigger,* 145 Fed. 103, 114 (C. C. A. 8); *Winslow* v. *Harold G. Ferguson Corp.,* 25 Cal. 2d 274, 276; *McArthur* v. *The John McArthur Co.,* 39 Cal. App. 704, 705; Hornstein, *The Counsel Fee In Stockholder's Derivative Suits* (1939) 39 Col. L. Rev. 784, 786, 789, 790, 793–794, 798, 806; 13 Fletcher, *Cyclopedia of the Law of Private Corporations* (1943 ed.), Sec. 6045, pp. 453, 456, 458,

459; 49 A. L. R. 1150–1151, 1190, 1166; 107 A. L. R. 750, and cases cited; 14 Am. Jur. p. 47.[3]

1. *The established rule:* In *Hobbs* v. *McLean, supra,* this Court stated the principle thus (117 U. S. at 582):

> When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. See *Trustees* v. *Greenough,* 105 U. S. 527, where the subject is discussed by Mr. Justice Bradley, and the cases cited; and *Central Railroad Co.* v. *Pettus,* 113 U. S. 116. But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reim-

[3] We do not, of course, take the position that success can only be demonstrated by a completely final judgment, where an unappealed interlocutory judgment finally determines certain aspects of the litigation for all practical purposes. It is the substance and not the form that counts. But no judgment which is being appealed can be taken as the badge of success.

> bursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.
>
> The Circuit Court was right in not compelling the plaintiffs to pay for services rendered and expenses incurred in a proceeding adversary to their interest, and carried on for the benefit of others.

The California Supreme Court, in the *Winslow* case, *supra,* on which movants relied in the lower court, commenced its opinion by the flat statement (25 Cal. 2d at 277):

> It is a well-established doctrine of equity jurisprudence that where a common fund exists to which a number of persons are entitled and in their interest *successful* litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund. By this means *all* of the beneficiaries of the fund pay their share of the expense necessary to make it available to them [Italics supplied.]

Hornstein, a recognized authority on stockholders' suits, says (*supra,* 39 Col. L. Rev. 798): "Under the general rule as to compensation, complainant is reimbursed only if he is successful. The test of success, however, is the ultimate result, not the intermediate rulings, and compensation, of course, includes compensation to plaintiff's counsel for work on the unsuccessful intermediate motions," and he adds that "In every case where compensa-

tion was awarded, the suit was successful, in whole or in part, or had resulted in a settlement beneficial to the corporation. Lower court decisions awarding compensation to complainant are naturally reversed when a judgment in favor of the corporation is reversed on the merits." (See also 39 Col. L. Rev. 786, 789, 790, 806). In the analogous case of a taxpayer's suit to recover funds alleged to have been improperly withheld from the municipality, the Supreme Court of Illinois dismissed an attorney's petition for counsel fees because the funds had not yet actually been recovered, although the plaintiffs had been authoritatively held to have stated a proper claim. *The People* v. *Holten,* 304 Ill. 394, 399.

2. *Movants' authorities:* We have been unable to find any intimation contrary to this established principle in any of the cases or authorities cited by the movants before Judge Hall (Instant Record, R. 41–46). Indeed, those which are in point support the view that counsel fees cannot be awarded unless and until substantial success is finally attained. In *Trustees* v. *Greenough,* 105 U. S. 527, counsel fees and expenses were not awarded until after the original plaintiff bondholder had succeeded in actually recovering a large amount of the trust fund, dividends to bondholders had been declared, and management of the trust fund had finally been taken out of the trustees' hands (p. 529). It is abundantly clear that the Court viewed the case as one of eminently

successful litigation by which a trust fund had actually been saved from waste and destruction, before application for fees was made or considered (pp. 532, 533, 534, 537).

In *Sprague* v. *Ticonic Bank,* 307 U. S. 161, the original plaintiff bondholder had secured a final award in her favor (including interest) from the Circuit Court of Appeals on June 1, 1937. 90 F. 2d 641 (C. C. A. 1). Certiorari limited to the question of interest on the award was granted by this Court on October 18, 1937. 302 U. S. 675. The case was argued on the issue of interest on February 2 and 3, 1938, and affirmed on March 7, 1938. 303 U. S. 406. After the argument here, but before decision, the plaintiff bondholder petitioned the District Court, on February 19, 1938, for allowance of counsel fees and expenses. See *Sprague* v. *Picher,* 23 F. Supp. 59 (D. Me.). The District Court, in a decision rendered on April 18, 1938, after the Court's decision in 303 U. S. 406, held that it was precluded by this Court's mandate, which had come down on April 11, from making any award. 23 F. Supp. 59. All that was held, on this point, in the decision in 307 U. S. was that the mandate did not control the issue of attorneys' fees, and that the lower court had been free to consider the matter. This Court did not hold or imply that such an award would have been proper before the plaintiff had succeeded in establishing her basic claim; the

suggestion is indeed to the contrary.[4] And there final success as to the major part of the claim had long been assured before application for fees was made.

In *Cowdry* v. *Galveston R. R. Co.*, 93 U. S. 352, the Court properly confirmed an allowance to an attorney who had instituted action, at the behest of the mortgage trustees, to foreclose certain railroad mortgages in Texas but was prevented from prosecuting the suit by the outbreak of the Civil War; at the close of the war he took steps to continue the suit, but before he could complete his arrangements, certain bondholders started and prosecuted to a successful conclusion a parallel foreclosure action in which large sums were recovered. The allowance was thus not granted until after the successful conclusion of the litigation which the attorney had initially begun. *Harrison* v. *Perea*, 168 U. S. 311, 325–326, allowed a fee to a solicitor who had successfully recovered assets of an estate.

In *Winslow* v. *Harold G. Ferguson Corp.*, 25 Cal. 2d 274, the "litigation [which was commenced in 1931] was brought to a successful close, so far as the merits of the controversy were concerned,

[4] In speaking of allowances of counsel fees and litigation expenses, the Court said (p. 168), "They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal places such a claim in much better perspective than it would have at an earlier stage."

by the entry of an interlocutory judgment on March 5, 1940, dissolving the trust and making the receivership permanent for the purpose of completing the liquidation of the trust assets" (p. 278). No appeal appears to have been taken. The main application for counsel fees, which was the subject of the *Winslow* case, was not made until August 11, 1941, over a year after the suit had been "brought to a successful close." In view of that fact, and of the California court's stress on *successful* litigation (*supra*, p. 12), the case can hardly be used to support the movants' position. In the *Winslow* opinion reference is made to a prior interim award of a fee of $500, in 1934, to one of the plaintiff's counsel. This fee was apparently paid by the receiver without protest, and its propriety was not involved in the *Winslow* case, which was concerned solely with the fee applications made some seven years later. Moreover, it appears that some irreversible benefits had already accrued by 1934 to the class represented by the plaintiff, and counsel fees might well have been awarded for those services.[5] In *Eggert* v. *Pacific States Savings & Loan Co.*, 53 Cal. App. 2d

[5] Although "extensive services were performed by both counsel for plaintiffs and intervener in recovering and protecting the assets of the involved trust" in the seven-year period from 1934 to 1941, no other application for counsel fees was made until after the suit had been brought to a successful close. 25 Cal. 2d at 279.

554, another California case on which movants relied below, counsel fees were allowed to attorneys unsuccessfully defending a suit by one building and loan association to impress a trust on certain property transferred to another such institution, where the State Building and Loan Commission was in possession and control of both institutions; the rationale of the decision was that the Commissioner could not, and did not purport to, defend the case on behalf of the defendant association, since he stood in the shoes of both parties, and that the defendant association could therefore conduct its own defense in order to protect its assets, and could secure reimbursement therefor. The case obviously has no bearing on an award of counsel fees in a derivative action.[6]

In *Central Trust Co. of New York* v. *United States Light & Heating Co.*, 233 Fed. 420 (C. C. A. 2); *Equitable Trust Co.* v. *Western Pacific Ry. Co.*, 236 Fed. 814 (N. D. Cal.); *Colley* v. *Wolcott*, 187 Fed. 595 (C. C. A. 8); *Buford* v. *Tobacco Growers' Co-op. Assn.*, 42 F. 2d 791 (C. C. A. 4), and *Wallace* v. *Fiske*, 80 F. 2d 897, 912 (C. C. A. 8), all cited by movants below (Instant Record, R. 45, 44, 46), the plaintiff's action was finally successful, and in each case the allowance of attorneys'

[6] Moreover, even in its own sphere, the case seems difficult to reconcile with the decision of the Supreme Court of California in *In re Pacific Coast Building-Loan Association*, 15 Cal. 2d 155.

fees followed, rather than preceded, the recovery.[1] In *Ruby Lee Minar, Inc.* v. *Hammett,* 53 F. 2d 149 (App. D. C.) the Court of Appeals quite properly upheld a lower court order awarding costs to a plaintiff whose bill had been dismissed, since at the same time it reversed the case on the merits and ordered judgment for the plaintiff. *Hammett* v. *Ruby Lee Minar, Inc.,* 53 F. 2d 144, 148 (App. D. C.).

The Annotation at 49 A. L. R. 1150, cited by movants (Instant Record, R. 45), states, as the general rule, that a court of equity will allow counsel fees "to a complainant (and sometimes directly to his attorney) who at his own expense has maintained a *successful* suit for the preservation, protection, or increase of a common fund * * *" (pp. 1150–1151), and with respect to stockholders' suits the annotation similarly refers to the right of one who "institutes and *successfully* maintains" a derivative action to an allowance of counsel fees "from the funds or *property thus recovered*" (p. 1190) [Italics supplied]. The Annotation at 107 A. L. R. 750, likewise cited to the lower court (Instant Record, R. 46), restates the same rule.

[1] In *Colley* v. *Wolcott, supra,* the court entered an order, six months before the final decree, that counsel would be paid, but the final decree was wholly formal and plaintiff's success had long before become final and irrevocable. Moreover, by the time the issue of counsel fees was before the Circuit Court of Appeals, the final decree on the merits, which had not been appealed, had become unappealable.

In the lower court, the movants also tried to shape their claim as a "cost of administration" which must be borne by the fund in the court's custody. As we have shown, the misconception is apparent. The cases in which payments are allowed out of a fund for administrative purposes before the close of the litigation are those in which a trust fund is being administered in court (such as a bankruptcy estate, an estate of a decedent or an estate over which the court takes jurisdiction by virtue of a creditor's bill), and actual expenses of conserving and administering the fund are incurred during the course of litigation. See *Warren* v. *Palmer,* 310 U. S. 132, 139. Here, allowances are sought from the fund, not for the purpose of administering it, but for the wholly separate purpose of carrying on the main litigation, which concerns the right to control the fund, and compensating the attorneys who have carried on the contest on behalf of one of the adversaries. For such allowances, appellees in No. 687 and their counsel must wait at least until they have finally succeeded in ousting the Conservator. See *supra,* pp. 7–8, 10–18.

In short, the established and unbroken rule requires appellees and their counsel to await the outcome of the appeal, and denies any fee allowance unless the appeal fails. Until that event, it cannot be said that the plaintiffs have succeeded, or that the Long Beach Federal Savings and Loan Association has secured any advantage or gain

from the suit. On the contrary, if petitioners (appellants in No. 687) are successful, it will clearly appear that the litigation has not been advantageous for the Association, which will have gained nothing and lost much from the entire action.

B. *Nature of the fund in the District Court's Registry:* Even if appellees in No. 687 are ultimately successful and the Conservator is ousted, attorneys' fees should not be allowed out of the funds in the District Court's registry, since appellees' efforts neither recovered the fund for the benefit of the Association nor preserved it from dissipation. As the Petition shows (pp. 7–8) the major part of the money was deposited by a neutral intervenor who, because of the Title Service Company's attitude, saw no other way to secure release and reconveyance of its trust deeds, and therefore deposited the money in court rather than pay it to the Association (acting through the Conservator). There never has been any doubt that the Association (whether acting through its board of directors, or through the Conservator) was and is entitled to the whole fund, and the intervenor (Home Investment Company) has never questioned the Association's right in any way. There was never the slightest danger that any portion of the fund would be dissipated by the Conservator if it had been placed in his charge. Thus, there are no funds which have been recovered or preserved through the efforts

of the appellees in No. 687, or their attorneys. All that they have done is to cause the money to be paid into court rather than to the Association; and to that extent, instead of aiding the shareholders of the Association, the appellees have injured them since the fund thus paid into court bears no interest and produces nothing for the Association or for its shareholders. This unnecessarily sterilized fund was created by the adamant position of the Title Service Company (controlled by substantially the same persons as those composing the former management of the Association), which, ignoring the fact that third parties are protected in dealing with *de facto* officers even though the Act should subsequently be held unconstitutional (see Brief for Appellants in No. 687, p. 97, fn. 45) (and now ignoring the fact that the Conservator is maintained in office by order of this Court), has tied up and continues to tie up the property of the Association by depositing trust deeds in court and filing *lis pendens*. This has compelled mortgagors to pay funds into court to obtain releases. The Association was thus unnecessarily deprived of the use of these funds or the interest thereon pending this litigation, and unnecessary burdens of litigation have been incurred by the Association and third parties.

In these circumstances, the fund in question was neither created, recovered, nor preserved by the action of appellees or their attorneys, and they

should not be entitled to draw counsel fees from it, even if they are successful here. Cf. *Hauenstein* v. *Lynham*, 100 U. S. 483, 491.

III

THE WRIT REQUESTED BY THE PETITIONERS SHOULD ISSUE AS AN INCIDENT TO THE DISPOSITION OF THE APPEAL IN NO. 687.

A. Since the appeal in No. 687 is properly pending here, and the Court has jurisdiction of that appeal, the Court has power to issue an auxiliary writ, such as that requested by petitioners, as an incident to the proper disposition of the case. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 272–274; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 24–26; *Ex parte United States*, 319 U. S. 730; *Ex parte Republic of Peru*, 318 U. S. 578, 582–585; *In re National Labor Relations Board*, 304 U. S. 486.

B. The present case is most appropriate for the exercise of this jurisdiction. We have shown above, and in the Petition, that an award of counsel fees and expenses would prevent this Court from fully exercising its appellate jurisdiction, and would partially destroy the results of a successful appeal, because it would divert from the Conservator and the Association some of the funds which the conservatorship was designed to protect. No timely relief, other than the prayed-for writ, is available. Normal processes of appeal, if they are available at all, would not bring the matter to

this Court in time for decision concurrently with the determination of the main case. Action by the District Court has been stayed by this Court, but it is necessary, if a judgment of reversal by this Court is to be effective, that no further steps be taken below to enter or enforce an award of counsel fees at least until final decision of the appeal in No. 687.

C. Petitioners also request that, if they prevail in the appeal in No. 687, final relief be granted them against any award of counsel fees and expenses by the lower court. Such an allowance would be in derogation of this Court's judgment of reversal. But the respondent District Judge plainly appears to be of the view that such an award can properly be made even if the appeal succeeds, and it appears most probable that efforts to secure such an award will continue, unless this Court clearly expresses the contrary opinion. We suggest that if the Court agrees with our view that the right to an award of counsel fees cannot survive a reversal on the merits of No. 687, in the interests of justice it should prevent further protracted and unnecessary litigation (undoubtedly including further appeals) by issuing the writ, in the event of reversal, so that it is clear that counsel fees are not to be awarded from the funds in the District Court's registry.[8] We believe that

[8] Presumably a statement by this Court in its opinion that movants were not entitled to counsel fees would make issuance of a writ unnecessary. Cf. *Ex parte Republic of Peru*, 318 U. S. 578, 590.

the occasion is appropriate for final decision upon the authority of the District Court to allow counsel fees, and that the Court has jurisdiction to do so as an incident to the appeal in No. 687.

CONCLUSIONS

For the foregoing reasons, leave to file the petition for a writ of mandamus and/or prohibition and/or injunction should be granted, and the relief sought therein granted.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
ROBERT L. STERN,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
OSCAR H. DAVIS,
Attorneys.

KENNETH G. HEISLER,
General Counsel,
RAY E. DOUGHERTY,
Associate General Counsel,
MOSE SILVERMAN,
Attorney,
Federal Home Loan Bank Administration.

APRIL 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

Office - Supreme Court
FILED
APR 30 194

No. [illegible]

IN THE

Supreme Court of the United States

October Term, 1940.

Ex Parte JOHN H. FAHEY and A. V. ANDREWS, Individually and Respectively as Federal Home Loan Bank Commissioner and Commissioner for the Home Owners Federal Savings and Loan Association.

In the Matter of the Petition of JOHN H. FAHEY and A. V. ANDREWS, Individually and Respectively as Federal Home Loan Bank Commissioner and Commissioner for the Home Owners Federal Savings and Loan Association, Petitioners,

For a Writ of Mandamus and/or Prohibition and/or Certiorari

v.

THE HONORABLE PEIRSON M. HALL, Judge of the District Court of the United States for the Southern District of California, and the Clerk and Deputy Clerk of Said Court.

ADDENDA TO APPENDIX TO RESPONDENT'S RETURN TO RULE TO SHOW CAUSE.

PEIRSON M. HALL, Respondent Judge.

Attorneys for said parties in interest:

Continued on page 2 Cover.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

EX PARTE JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION.

IN THE MATTER OF THE PETITION OF JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONERS.

FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

V.

THE HONORABLE PEIRSON M. HALL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND THE CLERK AND OTHER OFFICERS OF SAID COURT.

ADDENDA TO APPENDIX TO RESPONDENT'S RETURN TO RULE TO SHOW CAUSE.

The following matter was inadvertently omitted from the appendix to the Return to the Rule to Show Cause by reason of the belief that it was to have been included by the Petitioners in the Appendix filed with their Petition for a Writ of Mandamus and/or Prohibition and/or Injunction.

IN THE

District Court of the United States

FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

CENTRAL DIVISION.

CIVIL FILE NO. 5421 P. H.

Closing Points and Authorities of Plaintiffs in Reply to Points and Authorities in Support of Resistance to Actions for Interim Allowance of Fees and Expenses and in Reply to Resistors' Supplemental Points and Authorities.

PAUL MALLONEE, C. N. NEWHOUSE and WINNIE BUCKLIN, Individually, and as Representatives of a Class, suing for and on behalf of all of the shareholder members of the LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, an Association organized and existing under and by virtue of the laws of the United States of America, *Plaintiffs*,

v.

JOHN H. FAHEY, individually, JOHN H. FAHEY, as Chairman of the Federal Home Loan Bank Board, A. V. AMMANN, individually and A. V. AMMANN, as the purported Conservator for the Long Beach Federal Savings and Loan Association, THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, sued herein as John Doe One (Cross-Claimant in Interpleader), R. H. WALLIS, sued herein as John Doe Two (Cross-Claimant in Interpleader), et al., *Defendants*.

"SUB NOMINAE"

HOME INVESTMENT COMPANY OF LONG BEACH, a corporation, *Intervenor,*

v.

PAUL MALLONEE, ET AL., and JOHN H. FABEY, ET AL., *Defendants in Intervention.*

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *Defendants and Third Party Plaintiffs,*

v.

FEDERAL HOME LOAN BANK, ET AL., *Third Party Defendants.*

ROBERT H. WALLIS, *Defendant and Third Party Plaintiff,*

v.

JOHN H. FAHEY, ET AL., *Third Party Defendants.*

TITLE SERVICE COMPANY, a corporation, *Defendant and Third Party Plaintiff,*

v.

JOHN H. FAHEY, ET AL., *Third Party Defendants.*

FEDERAL HOME LOAN BANK OF LOS ANGELES, ETC., *Third Party Defendant and Cross-Complainant,*

v.

FEDERAL HOME LOAN BANK OF PORTLAND, sometimes known as Federal Home Loan Bank of San Francisco, et al., *Third Party Cross-Defendant.*

Apparently the supplemental points and authorities in support of resistance to motions filed by the resistor Ammann on March 24, 1947, includes all of the points and authorities in support of the resistance to motions which were previously filed by resistors on Thursday, March 20, 1947, and therefore plaintiffs' reply points and authorities will be directed to the resistors' supplemental points and authorities.

I.

RULE NUMBER 54.

FEDERAL RULES OF CIVIL PROCEDURE.

This rule reads in part as follows:

> "(b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and in all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

When this rule became effective on September 16, 1938, it became self-operating and it is believed it speaks for itself.

The judgment of the three-judge court was entered subsequent to the effective date of this rule and as submitted, the language used is clear and the only reasonable interpretation of the words "the judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims," is that the three-judge court made a decision upon the subject for which it was convened under Section 380 (a) of these rules and that it decided only the constitutional issue and the merits incidental thereto, and that this court, acting in the person of one judge "shall proceed as to the remaining claims". The remaining claims involved the interpleader cross-actions, the cross-actions of the Long Beach Federal Savings and Loan Association, the various intervention ad-

ministrative matters and such action as is reasonably necessary to preserve the corpus of the common fund.

It is well settled that, in equity, the court may determine the payment of costs in its discretion whether they follow the decree or not.

See:

United States v. *Bethlehem Steel Corp.*, 29 Fed. Supp. 259, cited in the District Court of Penn. (1938).

United Building and Loan Association v. *Garrett*, D. C. Ark. (1946) 64 Fed. Supp. 460.

Brunswick Balke-Callendar Co. v. *American Bowling & Billiard Corp.*, CCA NY 1945. 150 Fed. 2nd. 69. Certiorari denied 66 S. Ct. 99, 90 L. Ed.

Swann Carburetor Co. v. *Chrysler Car*, CCA Mich. (1945) 149 Fed. 2d. 476.

President & Directors of Manhattan Co. v. *Kelby*, CCA NY (1945) 147 Fed. 2d. 465. Certiorari denied 65 S. Ct. 916, 324 U. S. 866, 89 L. Ed. 1422.

Crutcher v. *Joyce*, CCA N. W. (1945) 146 Fed. 2d. 518.

In the case of *United Building and Loan Association* v. *Garrett*, D. C. Ark. (1946) 64 Fed. Supp. 460, the costs of an interpleader action, including attorney's fees, on order of the court to stakeholders paying funds into court, were in part assessed against the trust fund held in the registry of the court.

In the case of *Trustees* v. *Greenough*, 105 U. S. 527 and 538 it appears that this discretion of the trial court could be exercised "by making allowance for attorney's fees and other expenses, pending the litigation, payable out of the common fund," the severability of the allowance of costs and attorney's fees from a decision on the merits of the issues at any stage was recognized by the Supreme Court of the United States in the case of *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 at page 168, when the court stated there was before it for consideration the question of

whether the immediate issue that the allowance of costs and fees, was disposed of in the main litigation, and therefore foreclosed by the mandate.

> "Certainly the claim for 'as between solicitor and client' costs was not directly in issue in the original proceedings by Sprague. It was neither before the Circuit Court of Appeals nor before this court. Its disposition, therefore, by the mandate of either court could be implied only if a claim for such costs was necessarily implied in the claim in the original suit, and its failure to ask for such costs an implied waiver. These implications are repelled by the basis on which such costs are granted."

The court went on to interpret the case of *Trustees* v. *Greenough*, 105 U. S. 527 at page 169 and then stated:

> "The inquiry was a collateral one, having a distinct and independent character" . . .

and further:

> ". . . we therefore held that the issue in the instant case is sufficiently different from that presented by the ordinary questions regarding taxable costs that it was impliedly covered neither by the original decree or by the mandates, and that neither constituted a bar to the disposal of the petition below on its merits."

It is submitted that the resistors' argument, if carried to its logical conclusion, would nullify completely the purposes of Rule 54 (b) and under the resistors' argument, if a judgment is entered on any phase of the action and an appeal was taken therefrom all other proceedings on the remaining issues and even administrative proceedings would be stayed by the appeal. If this were correct it would nullify the subsequent words, "and the action shall proceed as to the remaining claims." Such interpretation is untenable.

II.

THE ALLOWANCE OF EXPENSES AND ATTORNEY'S FEES UNDER THIS MOTION WOULD BE AN ADMINISTRATIVE ORDER AND NOT A DECREE OR JUDGMENT IN CHIEF.

That such payment in a case of this type is pendente lite matter, was made clear by the Supreme Court in *Trustees* v. *Greenough*, 105 U. S. 527 at page 532, where the court in describing the case stated:

> "But in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust . . ."

In considering the application for fees and expenses, the court on the same page made the statement that:

> "It is a general principle that a trust estate must bear the expenses of its administration."

The case of *Winslow* v. *Harold G. Ferguson Corp.*, 25 Cal. 2d 274, 153 Pac. 2d 714, cited by both plaintiffs and the resistor is probably more similar to the case at bar than any of the other cases cited. For there, as here, there was a class action for the preservation of the common fund. While the action in chief was pending, an order for payment of attorney's fees on account (pages 282 and 284) was made by the court and again after an interlocutory judgment, the court fixed the total attorney's fees for plaintiff's counsel prior to final judgment. (Page 283)

In its opinion the court pay careful attention to the decision of *Trustees* v. *Greenough*, and *Sprague* v. *Ticonic National Bank*, as well as other cases and reaches the conclusion (page 285):

> "The expense incurred by a litigant for legal services in causing the appointment of a receiver is as much an expense of administration as the charge of the receiver's counsel and should have priority to the same extent."

In discussing the priority of a claim of the United States Government for income tax against the trust in relation to the priority of plaintiffs' counsel fees for preservation of the fund, the court stated at page 286:

> "The later, viewed as an expense of judicial administration in making the trust assets available for distribution to claimants, should properly take priority."

Being an administration expense, it is not a part of the judgment in chief and was not so considered in either of the two leading cases cited above.

III.

ATTORNEY'S FEES AND EXPENSES ARE ALLOWABLE PRIOR TO FINAL DETERMINATION OF LITIGATION.

In *Sprague* v. *Ticonic National Bank*, 307 U. S. 162 (1938), where there had been extensive litigation, and before its final disposition, proceedings were taken (page 163) on February 19, 1938, in the District Court, for the allowance of counsel fees and expenses over and above the regular taxable costs (page 162), the District Court adopted the same position now being urged by counsel for the objectors, and denied the application for counsel fees and expenses. Thereafter appeal was taken to the Circuit Court of Appeals, First Circuit, *Sprague* v. *Ticonic National Bank, et al.*, 99 Fed. 2d. 583, which court affirmed the district court's denial of the application for fees. Certiorari was granted to the United States Supreme Court. Mr. Justice Frankfurter, in rendering that court's opinion in *Sprague v. Ticonic National Bank, supra,* pointed out (page 163) that the District Court had held in its opinion:

> "That it had no authority to grant the petition on the ground that after the appeal from this decree in 14 Fed. Supp. 900, it had no further function to perform, other than to carry out the mandate of the Supreme Court when received."

and the Supreme Court further, at page 164, stated:

> "Obviously both courts disposed of the petition, not as a considered disallowance of attorneys' fees and litigation expenses in the circumstances of the particular suit, but because the deemed award of such costs beyond the power of the district court."

In disposing of this contention, the Supreme Court states (page 168):

> "Certainly the claim for 'as between solicitor and client' costs was not directly in issue in the orginal proceedings by Sprague. It was neither before the Circuit Court of Appeals nor before this court. Its disposition, therefore, by the mandate of either Court could be implied only if a claim for such costs was necessarily implied in the original suit, and its failure to ask for such costs an implied waiver. These implications are repelled by the basis of which such costs are granted."

and further at page 169, the Supreme Court held:

> "We, therefore, hold that the issue in the instant case is sufficiently different from that presented by the ordinary questions regarding taxable costs that it was impliedly covered neither by the original decree nor by the mandates, and that neither constituted a bar to the disposal of the petition below on its merits."

The decision of the Circuit Court of Appeals was reversed,

> "* * * so that the District Court may entertain the petition for reimbursement in the light of the appropriate equitable considerations."

This follows the same equitable principles established by the leading case of *Trustees* v. *Greenough, supra,* wherein the court in allowing substantial fees and expenses for the

services rendered by the petitioner in preserving a fund for and on behalf of a class, recognized that such fees and expenses might be allowed during the litigation and before its final decision. The United States Supreme Court there stated:

> "The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied."

Mr. Justice Miller, the one dissenting Justice in the case of *Trustees* v. *Greenough*, supra, based his dissent primarily upon the ground that the decree allowing attorneys' fees and expenses was premature. He objected to the payment of attorneys' fees and expenses:

> "* * * pending the litigation, payable out of the common fund, when it may be finally decided that the party who employed the attorney, or incurred the costs, never had any interest in the property or fund in litigation."

Nevertheless, the United States Supreme Court affirmed the allowance of the attorneys' fees and expenses *pending* the litigation.

To like effect is the California decision of *Winslow* v. *Harold G. Ferguson Corporation*, 25 Cal. 274 (1944), wherein the Supreme Court of the State of California, speaking through Mr. Justice Curtis, states the rule to be:

> "It is a well established doctrine of equity jurisprudence that where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund. By this means *all* of the beneficiaries of the fund pay their share of the expense necessary to make it available to them." (Citing cases.)

In said litigation, an allowance was made, of counsel fees on April 25, 1934, prior to the entry of any judgment, even in

the trial court, to counsel for plaintiff, Mr. Raymond Tremaine, who represents the defendant and interpleader Robert H. Wallis in the instant litigation.

The litigation was there

> ". . . not brought to a successful close until March 5, 1940, when an interlocutory judgment was entered dissolving the trust and making the receivership permanent for the purpose of completing the liquidation of the trust assets."

After the making of the interlocutory judgment and before the making of a final judgment, a joint application of all counsel was made, supported by detailed affidavits, enumerating the services rendered and an order of court was made prior to final judgment for counsel fees and costs to plaintiff and intervener.

In further discussing the situation, the California Supreme Court states (page 284):

> "Counsel's right to compensation under such circumstances arises from the benefit conferred upon those who would have suffered less but for his timely intervention and not by reason of an agreement to pay his fees." (*Buford* v. *Tobacco Growers' Co-op. Assn.*, 42 Fed. 2d 791).

Further, at page 285, the California Supreme Court states:

> "Not only is it established that the litigant is entitled to be compensated for the expense he has incurred in the prosecution of such an action, but there is created in favor of the attorney who renders the service, an equitable lien against the fund so preserved. (Citing Central Railroad & Pkg. Co. v. Pettus, 113 U. S. 116 (5 S. Ct. 387, 28 L. Ed. 915): Galley v. Wolcott, 187 Fed. 595 (109 C. C. A. 425); Muskegan Boiler Works v. Tennessee Valley I. & R. Cl. 274 Fed. 836)".

Similarly, in *Buford* v. *Tobacco Growers' Co-op Assn.*, supra, decided in 1932, the Circuit Court of Appeals re-

versed the District Court's decision as to attorneys fees and expenses and remanded with directions to the District Court to ascertain if attorneys fees should be allowed to counsel for having instituted the receivership proceedings, *in addition* to the fees which the court had already allowed the name counsel for representing the receiver.

Other cases to the same effect:

Fox v. *Hale & Norcross N. M. Co.*, 108 Cal. 475 (1895) wherein, on a stockholders' suit in behalf of the corporation, the court appointed a receiver with instructions to collect the moneys and to pay over to the attorneys 25% of the funds so collected and to distribute the balance. There was no direction to withhold the payment of the 25% attorneys fees until the end of the litigation.

In affirming the judgment, the court stated that the petitioner was

> "... clearly entitled to an allowance out of the moneys collected of his reasonable expenses, including counsel fees."

Rehearing was denied.

Farmers, etc. National Bank v. *Peterson*, 5 Cal. 2d. 601 (1936) at page 607, wherein the Appellate Court states:

> "In cases such as this, where plaintiff is prosecuting the action for the benefit of numerous persons, the court is permitted, and justly so, to provide for plaintiff's attorneys fees out of the moneys recovered for their joint benefit."

and affirmed the allowance of five percent (5%) attorneys fees.

Cowdry v. *Galveston R. R. Co.* 93 U. S. 352 (1876 23 L. Ed. 950), counsel fees of bondholders were paid by the receiver out of receivership funds to a former attorney for the partial foreclosure of a mortgage, even though the attorney paid had never prosecuted the action to completion, because the Civil War had intervened, and after the war other counsel had been retained to carry on the litigation.

The allowance of attorneys fees to first counsel was made before the litigation was concluded (page 538).

In a class suit by unsecured creditors to establish priority ahead of the bondholders, the court allowed attorneys fees and expenses to the plaintiff in the amount of 5% of the total funds involved, which allowance was permitted.

IV.

RESISTOR'S CASES ARE ALL DISTINGUISHABLE.

The resistor A. V. Ammann has cited some fifty-four or fifty-eight cases, all of which are clearly distinguishable from the instant motions for an interim allowance on account of attorneys fees and expenses.

To herein individually distinguish each of these cases cited by resistors would make this Reply Points and Authorities unduly long, hence, we are taking the liberty of distinguishing them in groups.

For the court's convenience, individual cases have been distinguished in the attached exhibits "A" to "H" inclusive, should the court care to refer to them.

A.

Point I of Resistor's case is that the stay order deprives the District Court of Jurisdiction to enter the order herein sought.

Quite a number of cases are cited in support of this doctrine, but we are unable to see how any of them are in point. No attempt has even been considered of trying to enforce the judgment as a whole or in part, nor as to any matter embraced within it. It is noted in reading the resistor's cases involving writs of supersedeas that a supersedeas has something of a blanket effect, whereas a stay of execution applies only to the particular matters therein stated as stayed. Even in a case of a writ of supersedeas, several of the cases cited, recognize that the trial court is not divested of all jurisdiction in a case of appeal, but only over the

matters covered by, or involved in, the judgment appealed from.

New Orleans Silica Brick Co. v. *John Thatcher & Sons,* (La.) 94 So. 148 at 149.

None of the cases cited by the resistor are contrary to the cases cited by plaintiff to the effect that the trial court retains jurisdiction over the matters not within the terms of the judgment appealed from. It is felt that a further discussion would waste the court's time. The individual cases cited under resistor's Point I are distinguished in Exhibit "A" attached.

B.

Resistor's second point is that the District Court has no authority to grant the pending motions while an appeal is pending.

The statement made is a very broad one, and the cases do not bear out the existence of any such broad rule of law. Most of them stand for the same rule as argued by the resistor in his Point I, that is, that after a writ of supersedeas has been received, the trial court may not order execution on its judgment. In no case cited by the resistor has the trial court held to have improperly considered matters not within the scope of the decision appealed from or to even have had before it a petition for expenses and fees. In fact in the case of *Bronson* v. *LaCrosse & Milwaukee Railway Co.,* 17 L. Ed. 616, the court held at page 618, that the trial court had the right to exercise such powers as might be necessary after the issuing of execution to regulate and control the administrative duties of officers in the execution of a final process. The court pointed out that pending the appeal the property in controversy remains in custody and care of the court below, and that that court had the power

> "pending the appeal, to adopt all proper and judicious measures to protect and preserve it from waste or loss."

Again in the case of *Goddard* v. *Ordway*, 94 U. S. 672, at 673, the court stated:

> ". . . the court below may make the necessary orders to preserve the fund."

The only case cited under this point deemed close enough to being an authority to call for comment is *Dickinson* v. *Rinke*, 132 Fed. 2d 884, where the action was for discovery of shares of common stock held by the defendants, a shareholders committee. The defendants removed the shares from the jurisdiction of the court after the filing of the complaint. Finally a contempt citation was issued and the shares were returned to the court. Thereafter the main suit proceeded to trial. Judgment was entered, dismissing the complaint in the main action, from which dismissal the plaintiffs appealed. The trial court in the main action reserved its judgment as to the determination of the contempt matter. After perfection of the appeal, contempt proceedings were had and fine imposed, from which judgment of contempt another appeal was taken. The resistor has dwelt upon the fact that the Circuit Court of Appeals held the District Court was without jurisdiction to sentence for contempt. The resistor failed to point out that the contempt was of itself a carrying out of a judgment in the main action, and secondly, that the Appellate Court granted a new trial simultaneously with rendering its decision, and so it did leave the matter open after the remand for the parties to procure a valid order from the district court in regard to the contempt, at which time the making of such order could be reviewed upon appeal and a judgment that might be later entered. The entire proceeding was for the purpose of discovery and recovery of secreted stock certificates, the contempt proceedings were essentially part of the action in chief, which had been entirely dismissed by the District Court and was only in existence by virtue of the appeal therefrom. We have no argument with the decision of the Circuit Court of Appeal holding that the District Court had no jurisdiction to proceed further with a matter

which it had dismissed and which was inherent in the dismissal judgment appealed from.

The resistor leaves entirely out of contemplation, the fact that by the allowance of fees and expenses to the plaintiffs, the funds in the custody or under the control of the court will not be dissipated and wasted, nor will they be awarded to one party or the other, and that all the movants are requesting is reimbursement of costs and expenses, including attorneys fees, administratively needed to protect the corpus of the assets of the fund from further dissipation and loss. The individual cases cited under resistor's Point II are distinguished in Exhibit "B" attached hereto.

C.

Point III of the resistor is that the motions are in contempt of the Supreme Court of the United States. It is quite true that if the lower court deliberately violates the direct order of a court to which an appeal is properly taken from its judgment, a contempt might exist. None of the cases cited in support of this statement have anything to do with any motion of the type under consideration here. One of the cases cited by opposing counsel, the case of *Martarano* v. *Robles,* 174 So. 910 (Fla. 1933) at page 912, expressly stated that the appeal does not necessarily bar the rights of the parties to proceed in the court appealed from insofar as such litigation may be lawfully proceeded with in due course, without having to depend upon the superseded order appealed from in order to justify such further proceedings as being according to law and equity practice, and further stated:

> "It does not interfere with the power of the court of original jurisdiction to make such further orders or decrees in the question as do not tend toward an execution or enforcement of the order of decree appealed from, nor place the funds of property involved beyond the judgment or decree of the appellate court."

and that the supersedeas operated only to suspend the particular order appealed from. The court denied a writ of prohibition and the trial court was free to proceed within the limits described. The individual cases cited under resistor's Point III are distinguished in Exhibit "C" attached hereto.

D.

In Resistor's Point IV, the resistor contends that a one-judge court is without jurisdiction to hear and determine the motions for the reason that a determination thereon would be a final judgment on a part of the main action. In support of this contention, the resistor has offered two citations only. The first one is listed as 28 U. S. C. 792, which is taken to be Title 28 U. S. Code Section 792. The application of this section is limited to matters involved in the code sections to which it is made applicable by number.

The purpose of this section, which became effective on April 6, 1942, was obviously to enlarge the jurisdiction of a single judge in cases which called for action by three judges. The only time the action of three judges is needed herein is when a decision must be made under Section 380 (a) of Title 28 of the United States Code, and that is only when an Act of Congress is attacked by injunctive proceedings as being repugnant to the Constitution. In order to remove any doubt as to the authority of one judge to act on all other matters arising in such litigation, section 792 was enacted. Attention is called to the fact that very broad language is used to the effect that

> "Any one of such three judges may perform all functions, conduct all proceedings, except the trial of such action and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States, in effect at the time",

the court goes on to specifically limit the power of the single judge on specific points, thus by interpretation giving him full power to act in all other matters such as this one, and these powers are not confined entirely to collateral or

remote functions. The only time this section has been cited in the U. S. Code Annotated is in the case of *United States* v. *Hancock Truck Lines, Inc.* 89 L. Ed. —, 65 S C E 1003, in which case an appeal had been taken from the final decree of a statutory three-judge court, enjoining an order of the Interstate Commerce Commission the right of a single judge to allow this appeal was attacked and the Supreme Court held the single judge had the necessary authority.

From this decision, it appears that instead of being authority for the resistor's point, that the authority of a single judge had been restrained, we find the Supreme Court recognized the section as protecting the authority of the single judge and not limiting him to collateral matters, and allowing him to act directly on the appeal of the three-judge court itself.

The other authority cited by opposing counsel under this point is our well-known case of *Trustees* v. *Greenough*, 105 U. S. 527, one of the leading authorities to the effect that the court has the power to allow expenses and fees pending the appeal of the main action. Opposing counsel have apparently cited this case, as shown by the comment appearing in lines 28 to 32 on page 8, under the assumption that Trustees against Greenough hold a trial judge as being without authority to grant fees, because the court in that decision held that the order granting attorneys fees to be a final order. The significance of that finding has apparently been overlooked, for what the court was actually holding was that the order granting costs and fees was not a part of the main action but was an independent matter, not included in the judgment appealed from. The fact is clear from a reading of the case, that the trial judge had the authority to allow costs and fees, while the litigation in chief was far from determined. It is still not understood why the case is cited in support of a contention that a single judge hasn't such jurisdiction. The case is not one involving the convening of the three judge court. The individual cases cited under resistor's Point IV are distinguished in Exhibit "D" attached hereto.

E.

Point V raised by the resistor is that no costs, fees or expenses are payable until the plaintiffs have finally been successful in their litigation. None of the cases cited so held and as to those which were decided before the decision was rendered in the cast of *Trustees* v. *Greenough*, supra, they are overruled by that decision.

The resistor has made no attempt to refute the cases cited on this point and the plaintiffs points and authorities attached to this motion, except to assert dogmatically that the right to the fund itself is in dispute and that expenses and fees are not allowable in such cases until it is finally determined to whom the fund belongs or until it is finally recovered for the benefit of those from whom the fees and expenses are claimed by the one asking them. However interested we may be in opposing counsel's opinion, we are impelled to accept it only as unsupported conclusion as to the law.

Counsel contends that the action was not brought to administer a fund. We challenge this assertion. Insofar as the plaintiffs have been able to do so, they have brought the fund within the custody and control of the court in order to conserve it from the waste and dissipation of the so-called conservator. The plaintiffs regret is that they have been unable to do so more completely, and thus have saved some ten million dollars ($10,000,000) which have been wasted by the defendant, the conservator, in spite of the plaintiffs' best effort to cause this fund to be properly administered. For the resistor to challenge the jurisdiction of a Federal District Court in litigation participated in by him, does not come with good grace, for the Federal Savings and Loan Insurance Corporation, also controlled by the defendant Fahey, as a plaintiff, voluntarily submitted itself to the jurisdiction of the United States District Courts, and when the jurisdiction of the District Court was attacked, this instrumentality so figures in the defense of the court's jurisdiction. The cases referred to are *Federal*

Savings and Loan Insurance Corporation v. *Kearney Trust Company*, 151 Fed. 2d 720, and *Federal Savings and Loan Insurance Corporation* v. *Third National Bank*, 153 Fed. 2d 678, decided only last year.

Apparently, the resistor wants the protection of the Federal Courts when it is convenient, but when he wants to be free from all lawful restraint he puts on his other hat and becomes a conservator.

Counsel feel compelled to take issue with the statement appearing on page 11, lines 28 to 30, wherein the resistor tries to make a distinction as far as judicial control is concerned, between a conservator and a receiver. The statement is made that the conservator is to conserve and not to liquidate. This is an erroneous assumption, particularly in the case an equity receiver.

It is further submitted that most receivers conserve far more than this conservator is doing. Opposing counsel contend that a conservator is not an officer of this court but of the government of the United States. It is submitted that in taking this position, counsel is placing an interpretation upon Section 5(d) of the Home Owners Loan Act of 1933, as amended, which is exactly that to which the plaintiffs object, and which in part, caused the three-judge court to hold this section repugnant to the Constitution for it endeavors to put an administrative agency above and beyond the reach of the prosecution of the courts of the United States, and thus deprives its citizens of their constitutional rights of due process and the constitutional restraints on delegation of legislative authority.

As the conservator is responsible to no one but his co-defendant Fahey, he is the principal culprit in the case. If the resistor's arguments are correct, Mr. Fahey is the sole complainant, prosecutor, judge, jury and appeal court in this case and it follows that the resistor, as his subordinate claims he has the power, and provides all the more reason for holding the section unconstitutional. If it is unconstitutional, the resistor is, himself, a trespasser, not acting

as a government official, but is subject to ouster, as are all others who trespass upon property they have no right to be on.

Counsel are also impelled to take issue with the statement appearing on page 12, lines 24 and 25 that the case of *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 which says that in any event the plaintiffs are not entitled to costs, fees and expenses utnil the case has been brought to a successful conclusion.

The statement is further made on lines 25 to 27 that the mandate from the Supreme Court decision in the case in chief had come down before the motion for costs was filed. This statement is of no particular importance, but indicates the carelessness of counsel's language, as such is not the fact. The motion for costs was filed before the mandate came down.

We feel that the court will not be misled and therefore will not argue at length the distinction between cases such as *Hobbs* v. *McLean*, 117 U. S. 567, where the court made a distinction between cases governing or protecting trust funds from proceedings attacking and otherwise adversary to the trust property.

The same distinction is presented in the case of *First National Bank of Atlanta* v. *Southern Cotton Oil Co.* 86 F. 2d 33.

The facts in the case of *Winslow* v. *Ferguson*, 153 Pac. 2d 714 apparently were not carefully studied before they were cited by the counsel for resistor in their brief, statement is made at page 13, line 22, that the suit must be brought to a successful conclusion. At the time the first fees were obtained by counsel for plaintiff there had been no judgment in the trial court, and when the second allowance of fees was made, there had been only an interlocutory judgment in the trial court.

The effect of this case is exactly the opposite for which it is cited. The individual cases cited under resistor's Point V are distinguished in Exhibit E attached hereto.

Point VI of resistor's brief is that it is the duty of the lower court to preserve the fund put into its registry pending the appeal. With this contention we are in entire accord. In fact that is exactly what the court is being asked to do. In none of the three cases cited in support of this contention was there any deposit in the registry of the court and in *Goddard* v. *Ordway,* 94 U. S. 672, at 673, the court recognized the authority of the court below to make the necessary orders to preserve the fund and to direct the receiver to that extent. The resistor seems to take the position that the granting of this motion, as an administrative step to preserve the common fund, would place the money beyond the control of the upper court. Pendente lite expenses for the prosecution of litigation are a very common practice in this country, where they are allowed daily many times in divorce, receivership, probate, bankruptcy, labor and material men's lien cases.

Here, really the conservator defendant can hardly be expected to do his duty and sue himself in his representative capacity. They likewise, according to the decision cited by plaintiffs are entitled to be reimbursed for their costs, expenses and attorneys' fees. Such allowances have never been considered to be depredations of the principal funds, which are the subject of the litigation and the resistor is indeed forced to great extremes to make a contention that no costs, fees or expenses should be allowable here, because he as the proper official to take such action has failed and refused to perform his duty. The individual cases cited under resistor's Point VI are distinguished in Exhibit F attached hereto.

G.

The next point raised by the resistor is Point VII wherein he contends that where the action is not brought to recover or preserve funds, an attorney's fee is not allowable therefrom. We agree. The individual cases cited under resistor's Point VII are distinguished in Exhibit G attached hereto.

H.

Point VIII raised by the resistor is that attorneys' fees, costs and expenses are not payable from a fund in court unless there is an express or implied contract. None of the cases cited by opposing counsel are in point. The case of *Lea* v. *Patterson Savings Institute,* 142 Fed. 2d 932, was a municipal bankruptcy proceeding. The statute prohibited attorneys' fees. The plaintiffs position was antagonistic to the funds involved. The case of *Tulare County* v. *City of Dinuba,* 270 Pac. 201 (California 1928) involved litigation between various cities and counties in the San Joaquin Valley in California, against the San Joaquin Light and Power Company. Tulare County was successful in some of this litigation, which incidentally benefited the City of Dinuba, and the attorney for the County of Tulare appeared as attorney of record for the City of Dinuba, and took all the advantage first obtained by the County of Tulare. The attorney sued to make the County of Tulare pay him for the alleged benefits from the work he had done for the City of Dinuba. Both the trial and the Supreme Court of California denied his application on the grounds (1) that the county government was involved, (2) that the county was represented by its own attorneys, (3) the county was within the litigation without the benefit of plaintiff and could not benefit from him. This decision was rendered prior to the decision in *Sprague* v. *Ticonic National Bank, supra,* but it is also distinguishable upon the ground that the proper attorneys were taking the proper action to gain the benefit cited.

In the case of *Williamson* v. *Los Angeles County Flood Control District,* 109 Pac. 2d 992, the plaintiff was a taxpayer who filed suit to recover, fraud participated in by a member of the County Board of Supervisors. There were four actions filed, two were dismissed, third was prosecuted by the Board of Supervisors to a successful conclusion and the fourth action was brought by the plaintiffs here with no recovery. Again, the officials properly respon-

sible for recovering or conserving a common fund did their duty and obtained their recovery. There was therefore no occasion for the plaintiffs to bring their suit and the court properly disallowed the application for fees. In rendering its decision, the court did not hold that in all cases such fees would be disallowed, but simply found the case before it was not such a case.

The case of *Hubbard* v. *Camperdown Mills,* 1 S. E. 5 (S. C.) (1886) is a little remote as to time, having been decided long before the decisions in *Sprague* v. *Ticonic National Bank* and *Trustees* v. *Greenough.* There the court found that the joinder of majority stockholders with a minority of stockholders obtaining the appointment of a receiver was not sufficient to create the relationship of class representations and the court therefore reasoned that it could not be successfully contended that the actions were for the benefit of the stockholders as a whole.

It is true that some language appears in some of these cases to the effect that a contractural relationship is necessary but the latter decision cited by counsel for plaintiffs impliedly held there is a quasi-contractural relationship between the representative plaintiffs and all others who benefit in like manner with them in the conserving of the common fund.

In giving these cases an interpretation most favorable to resistor, these cases are overwhelmed by the great weight of the many cases in which the expenses and fees have been allowed and paid without there being any express contract between the parties forced by court order to contribute to the cost of the procurement or conservation of the common funds. See discussion of this point in *Winslow* v. *Ferguson,* 25 Cal. 274, 284 discussed at p. 9 herein.

The Columbia Law Review particularly cited, does not mention the *Ticonic Bank Case,* although it was apparently issued subsequent to that decision. The author's conclusions are contrary to the conclusions of the Supreme Court. It is assumed the view of the Supreme Court will prevail.

The individual cases cited under resistor's Point VIII are distinguished in Exhibit H attached hereto.

Eggert v. *Pac. States,* 20 Cal. 2d 199 (1942).

V.

Successful termination of litigation is not a prerequisite to the allowance of attorneys fees and costs; see *Egrett* v. *Pac. States Savings and Loan,* 53 Cal. App. 2d, 552 in 1942, where attorneys fees of $36,270 were allowed to the firm of O'Nelveny & Myers, who had represented the directors of the Pacific States Savings and Loan Association, against whom the decision was rendered.

Such attorneys fees were also not subject to the adverse decision of the matter in chief. (See also Thomas Delamer & Company Ltd.—cases last point 7.)

CONCLUSION.

The volume of cases cited by resistor (approximately 54) which have no relationship to the instant motions has made it very difficult to briefly summarize the distinguishing features, which are very numerous. These difficulties in making a brief summarization arise from the facts that:

1. The cases cited usually have no relation to the point they are cited to support.

2. The rules of law cited are sometimes a broad statement of principle, subject to many exceptions including factual situations applicable to the case at bar and a number of the cases are factually unrelated to the case at bar.

It appears from an analysis of the resistor's points and authorities, that he contends that any appeal takes all jurisdiction away from the trial court and that if the court should allow any reimbursement of costs and allowance for attorneys fees for the preservation of the common fund, would be a withdrawal of assets from the jurisdiction of the upper court to decide the case on appeal and that such

action the resistor claims, would be in contempt of the upper court. None of these contentions are tenable.

The cases are clear that the trial court retains jurisdiction over such collateral matters pendente lite and has a right to award expenses and fees in a situation such as this.

The other portions of the resistor's house of cards fall with the collapse of this foundation. It is obvious that what the resistor is seeking to do is to deprive the movants herein from receiving by reimbursement, enough funds to carry on the litigation against the resistor, and thus prevent the movants from protecting the judgment which finds him guilty of unlawful acts.

To deny these applications would undoubtedly result in the further dissipation and waste of the funds the plaintiffs and the other movants as well as this court are trying to preserve.

Respectfully submitted,

WESTOVER & SMITH

By /s/ WYCKOFF WESTOVER
WYCKOFF WESTOVER
Attorneys for Plaintiff

EXHIBIT "A".

DISTINGUISHING RESISTOR'S CITATIONS UNDER POINT I.

Stockton v. *Bishop*, 43 U. S. 74, 11 L. Ed. 184.

Pending an appeal the plaintiff obtained from the Circuit Court a writ fiari facias by way of execution. The Supreme Court issued a supersedeas and declared (p. 73) the execution wholly irregular.

This case is not authority for anything except that appellant may apply for a stay of execution on the judgment appealed from.

Note: A writ of fiari facias is the process to enforce the collection of a claim which has gone to judgment after it is final and executory. It is a general execution.

16 Words and Phrases Perm. Ed. 525 Cases cited.

Lincoln Mines v. *Huron*, 27 Fed. Supp. 720.

Involved questions of satisfaction of judgment and judgment against surety on appeal bond after remand only. It was held (p. 724) that an attachment of a judgment could issue (apparently pending the appeal).

Dry Cleaners v. *Reiss*, 54 Pac. 2d. 470 (Calif. S. Ct. 1936).

Here the question was one of enforcement of a temporary injunction pending an appeal. Appellant asked for a writ of supersedeas, which was denied and the injunction allowed to stand.

Rosenfeld v. *Miller*, 15 Pac. 2d. 161 (Cal. Sup. Ct. 1932).

Here the court was only concerned with the discretion of the trial court to issue a writ of supersedeas when the appellants sureties on an appeal bond failed to qualify.

Montgomery v. *Sioux City Seed Co.*, 71 Fed. 2d. 926.

Involved only a question of the right of a state trial court to set aside a default judgment after appeal. Held (p. 929) the trial court had jurisdiction even after appeal taken to set aside the judgment.

Smith v. *Govt. of Canal Zone,* 249 Fed. 273.

An order granting a temporary injunction and denying a motion to dismiss the complaint was not subject to review on appeal because it was not final (p. 274). The order granting the preliminary injunction was reversed (p. 277) because of the inapplicability of Merchant Marine Act.

New Orleans Silica Brick Co. v. *John Thatcher & Sons,* 94 S. 148.

It was held that under Louisiana Statutes the trial court (p. 149) was

> "divested of all jurisdiction *over the matters covered by and involved in said appeal,* and that jurisdiction over *these phases* of the controversy between the parties is thereby transferred from the trial court to the appellate court." (Italics ours.)

By implication, this case is authority to the effect that matters not in the judgment on appeal remain in the trial court.

Carroll v. *Palfus,* 154 N. W. 213 (S. Ct. Neb. 1915).

Defendant moved for dismissal of case in chief after supersedeas bond filed. Court denied the motion because its power was suspended.

This was an attempt to determine in the trial court all of the issues in the judgment appealed from while it was on appeal.

Barnett v. *Strain,* 111 SE 574 (S. Ct. Ga. 1922).

Trial court could not appoint a receiver to carry out execution on the judgment after supersedeas bond on appeal had been filed.

Vineyard v. *Stassi,* 158 S. 161 (Ct. of App. La. 1934).

The trial court, after appeal has been taken and a supersedeas bond issued cannot then issue a writ of fiori facias. To do so would be an enforcement while on appeal and after stay of the very judgment appealed from.

EXHIBIT "B".

DISTINGUISHING RESISTOR'S CITATIONS UNDER POINT II.

Brazer v. *Davis*, 102 U. S. 370.

Execution on judgment appealed from could not be issued after supersedeas bond accepted where no fraud present (p. 371).

Keyser v. *Farr*, 165 U. S. 265.

It is the province of the appeal court to increase the amount of bond on appeal.

Hovey v. *McDonald*, 109 U. S. 150.

The issue was the validity of an order of the trial court to a receiver to pay funds to the defendants after oral notice of appeal and before bond (p. 154). The decree appealed from was affirmed and it was held to be the duty of the receiver to obey the decree (p. 162).

Goddard v. *Ordway*, 94 U. S. 672, 673 (1876).

A receiver held money collected on a debt when a supersedeas stay bond was issued on appeal order of the court directing the receiver to pay the money in execution of the actual decree appealed from would be to defeat the appeal (p. 673) but the court pointed out (p. 673) that:

> ". . . the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent . . . ."

The motion for a writ staying payment was denied as unnecessary (p. 673).

Distinguished, as there were no funds on deposit in the registry of the court whereas in the instant motions the movants are asking the court to make a pendente lite order to pay out only a small part of the funds on deposit in the registry of court, to preserve the corpus of the litigation, the association itself.

Bronson v. *LaCrosse & Milwaukee R. R. Co.*, 1 Wall 465, 17 L. Ed. 616.

A motion was made for writ of prohibition directed to the district court to enjoin it from making any order in re the disposition of funds in the hands of a receiver, or making any order or decree pending the appeal. The court held, at page 618, that the trial court had the right to exercise such powers as might be necessary after the issuing of execution in order to insure the execution of such processes as are necessary to regulate and control the ministerial duties of officers in the execution of process. The court held that pending the appeal the property in controversy remains in the custody and care of the court and stated (p. 618):

> "... it is agreed that a few powers exist in that court, pending the appeal to adopt all proper and judicious measures to protect and preserve it from waste or loss."

The application for the writ was denied on the theory that it was unnecessary to advise the trial court of the limits placed upon its powers as expressed in this opinion.

In other words this case is good authority for the movants' contention that this court does have jurisdiction to grant the orders sought in order to preserve the property pending the appeal.

Bankers Indemnity Company v. *Pinkerton Co.*, 89 F. 2d 194 (1937).

It was held that the trial court could not amend its judgment so as to add interest after it had allowed an appeal which had been perfected. Again this was an attempt to

change the judgment or amend it or enforce the actual judgment being appealed from rather than as in the instant case, a collateral motion pertaining to a collateral issue, pendente lite.

Rogers, et al. v. *Consolidated Rock Products Co. et al.*, 114 F. 2d. 108 (1940).

After an order of reorganization under Section 77 (b) of the Bankruptcy Act, entered September 8, 1938, and an appeal had been taken from said order in October, 1938, the petitioners proposed on June 5, 1939, a change and modification of the order and plan which had already been appealed. The Appellate Court held that in addition to the proposed plan having already been appealed from by the same parties, that they were equitably estopped because an "unreasonable time for such proposal of alternate plans had long expired."

This was an attempt to change the very judgment appealed from instead of a collateral matter, as in the instant case.

First Nat'l Bank of Miles City v. *State National Bank of Miles City*, 131 F. 430 (1904).

After an appeal from a judgment in bankruptcy had been perfected and without moving to dismiss the appeal the appellants moved for a rehearing on the ground of newly discovered evidence, which was denied, the appellate court holding that the trial court

> ". . . is deprived of taking any action upon any question involved in the appeal"

But the motion for attorneys fees and expenses in the instant case is a collateral matter, *not* involved in the judgment which is now on appeal.

Berman v. *United States*, 302 U. S. 211 (1937).

After appealing from his sentence the defendant without dismissing or withdrawing his appeal, applied to be resen-

tenced, which the court did. This was a criminal case and therefore sentence is the equivalent of judgment and resentencing went to the heart of the actual judgment pending on appeal so it was not a collateral matter.

Dickinson v. *Rinke*, 132 Fed. 2d. 884 (1943).

Involved a matter of contempt for removal of stock from the jurisdiction of the court. This case is discussed and distinguished, in plaintiffs closing Points and Authorities under Paragraph "B", IV.

EXHIBIT "C".

DISTINGUISHING RESISTOR'S CITATIONS UNDER POINT III.

In Re Alexander McKenzie, 180 U. S. 536.

Writ of habeas corpus is not a proper writ to review the question of the jurisdiction of the Circuit Court, who had issued a supersedeas order directing a receiver to return gold dust and other property which he held. The circuit court held receiver in contempt for refusal to obey its order. There was no question of any collateral matter outside the circuit court's direct order as here.

Martarano v. *Nobles*, (147 So. 910 (Fla.) 1933)

Referring to a supersedeas stay bond on appeal the court states:

> "It does not interfere with the power of the court of original jurisdiction to make such further orders or decrees in the question as do not toward an execution or enforcement of the order or decree appealed from, . . . "

Discussed and distinguished further in plaintiffs' closing points and authorities, under Paragraph "C" of IV.

McDowell v. *Hightower*, 242 S. W. 753 (S. Ct. Texas 1922)

The only question there involved was the authority of the court to issue a writ of mandamus. They found that no damage had been committed. This case is not in point.

Economy Cash and Carry Laundry, Inc. v. *Florida Dry Cleaning and Laundry Board,* 186 S. 422 (Fla. 1939)

Upheld the right of the Appellate Court to punish for violation of a restraining order. No question involving the right of a trial court to proceed on collateral matters pending appeal on judgment in chief issue as was there involved.

Fisher v. *Frito Co.,* 81 S. W. 2d 282 (Texas 1935)

Court announced its power to punish for contempt of the trial court's orders but found no contempt had been committed.

Wilson v. *State of North Carolina,* 169 U. S. 586 (1898)

This is a quo warranto proceeding to oust a railroad commissioner who declined to vacate after his successor had been appointed. Supreme Court of the State held in favor of the appointed successor and the former commissioner appealed to the U. S. Supreme Court who issued writ of supersedeas and stayed execution. Original commissioner broke into the office of his successor, but upon showing by him that the order of the U. S. Supreme Court had not been served upon him and that he had no knowledge of it, he was held not guilty of contempt. This case is not in point.

EXHIBIT "D".

DISTINGUISHING RESISTOR'S CITATIONS UNDER POINT IV.

28 U.S.C. 792. (Enacted in 1942)

This section was enacted to enlarge the authority of a single district judge to handle collateral matters incident to litigation necessitating statutory courts, such as provided for in section 380(a) of Title 28.

Since the current motion for attorneys' fees and expenses does not involve the enjoining of an enactment of Congress upon the ground of its unconstitutionality, the convening of a three judge statutory court, provided for by Section 380(a) Title 28, U.S.C. is not required. This scetion is fully discussed in plaintiffs closing points and authorities, page 17.

Trustees v. *Greenough,* 105 U. S. 527.

Fully discussed in plaintiffs closing points and authorities, under Paragraph "D" of IV and elsewhere.

EXHIBIT "E".

DISTINGUISHING RESISTOR'S CITATIONS UNDER POINT V.

Hobbs v. *McLean,* 117 U. S. 567.

Partnership accounting in which no funds were yet available because of another suit pending by the partnership. Held that distribution could not be made of partnership funds not yet available.

Discussed in plaintiffs closing points and authorities, under paragraph "E" of Point IV.

Sprague v. *Ticonic National Bank,* 307 U. S. 161 (1939)

Has been sufficiently discussed throughout the current points and authorities by both sides.

First National Bank of Atlanta v. *Southern Cotton Oil Co.,* 86 F. 2d 33 (1936)

Allowance of attornys fees and expenses to losing creditor out of funds awarded to opposing winning litigant in adversary proceedings is not customarily allowed. Even though the claimant was not successful the circuit court of appeals expressed the opinion that since the claims were presented in good faith, the district court should take a broader view of the matter in awarding expenses for main-

taining and keeping up the common property. This is distinguished from the current motions involving plaintiffs own funds. It is fully discussed in plaintiffs closing points and authorities under Paragraph "E" of Point IV.

Standard Lbr. Co. v. *Interstate Trust Co.*, 82 F. 2d 346.

This was an adversary proceeding to collect a judgment. Not a class suit regarding funds preserved. It was decided prior to *Sprague* v. *Ticonic Bank*, supra (1939).

Distinguished, as the current motions are for fees and expenses to be allowed out of funds belonging to all of the plaintiffs benefited, for preserving such funds.

North American Building & Loan Association v. *Richardson*, 28 Pac. 2d 1044, 219 Cal. 685 (1934).

The appellants sought an allowance in advance to pay their costs on appeal, which amounted to $426.80. The court declined to allow the losing appellants their costs from funds held by said commissioner, belonging to an organization which was technically insolvent, i.e., its net assets were less than its capital. This case is not in point, as it deals with costs, not attorneys fees or expenses, and there was no fund preserved through the efforts of the petitioners as in the instant case.

Winslow v. *Ferguson*, 153 F. 2d 714, 25 Cal. 2d 274 (1944).

Fees and expenses were here allowed even before decree and a second award of fees made after interlocutory judgment but before final judgment. Discussed fully in plaintiffs closing points and authorities under Paragraph "E" of Point IV.

Williamson v. *Los Angeles County Flood Control District*, 109 Pac. (2d) 992.

After Supervisors had brought proper suit which they prosecuted to successful conclusion, the plaintiff brought an unsuccessful taxpayers suit which was unnecessary.

Discussed fully in plaintiffs closing points and authorities under Paragraph "E" of Point IV.

Seakamp v. *Warner,* 4 N. E. 2d (1935), Ohio.

Attorneys fees and expenses of the plaintiffs were disallowed on appeal. Pursuant to mandatory exclusive Ohio Statute the superintendent of Building and Loan Associations had brought a writ to have certain accounts of the Miami Building and Loan Association rectified. The reversal was based upon the Ohio Statute, which was held to be exclusive and mandatory upon the Superintendent of Building and Loan Associations to bring such suits. He had brought and successfully prosecuted the proper suit. The plaintiffs suit was unnecessary.

Witherspoon et al. v. *Nernbein et al.,* 865 (Colo. 1921)

In this case an attorney represented a corporation in two actions. Later an action was taken by stockholders against the directors of the corporation for appointment of a receiver upon the ground of fraud. The attorney represented the directors and claimed to represent the corporation. He asked for an order allowing fees in a lump sum by the trial court.

Held that he was not entitled to fees from the common fund, as the fact showed that he represented the directors in their fraudulent acts which caused the appointment of the receiver. In other words, he was neither conserving or preserving any common fund, but was in fact defending and participating with the wrongdoers.

Federal Savings and Loan Insurance Corp. v. *Third National Bank,* 153 F. 2d 678 (1946).

Court held Federal Courts did have jurisdiction because a Federal question was involved. Not in point as to allowance of fees and expenses. This has been discussed in

plaintiffs closing points and authorities under Paragraph "E" of Point IV.

Federal Savings and Loan Insurance Corp. v. *Kerney Trust Company,* 151 Fed. 2d 720 (1945) —Not in point on any question as to the allowance of fees and expenses. Only decided Federal Courts had jurisdiction as a Federal question was involved.

This has been discussed in plaintiffs closing points and authorities under Paragraph "E" of Point IV.

Deitrick v. *Greaney,* 309 U. S. 190 (1939).

In this case the receiver of a national bank sued one of its directors on a promissory note given by the director of the bank for an illegal purchase of bank stock by the bank. Such a purchase was prohibited by the National Banking Act. Defendant claimed an estoppel which the court disallowed. As the case does not involve a question of fees or expenses or any allowance by any court for such fees or expenses, it is not in point.

D'Conch, Duhme & Co. v. *Federal Deposit Insurance Corporation,* 315 U. S. 447, (1942)

In this case the Federal Deposit Insurance Corporation acquired a $5,000.00 accommodation maker note given by the defendant to a bank in Mississippi. The bank wrote off the note. The Federal Deposit Insurance Corporation later acquired it as a part of the collateral for a loan made to the bank. As no question of fees or expenses were there involved the case is not in point.

EXHIBIT "F".

DISTINGUISHING RESISTOR'S CITATIONS UNDER POINT VI.

Goddard v. *Ordway*, 94 U. S. 672-673 (1876)

Discussed and distinguished in plaintiff's closing Points and Authorities under Paragraph "B" of Point IV.

Halvenstein v. *Lynhan*, 100 U. S. 483.

The court held (p. 490, 491) that the escheator and his counsel were not entitled to compensation because their relief was to receive a percentage allowed by law for making sales of real property in ordinary cases. Decided prior to both *Trustees* v. *Greenough*, supra, and *Sprague* v. *Ticonic National Bank*, supra. There was there no fund on deposit with the registry of the court.

Pacific Coast Casualty Co. v. *Harvey*, 250 F. 952, 9 CCA (1918)

This case has nothing to do with any deposit in the registry. The issue before the court was on the liability of a surety on the supersedeas bond for the payment of costs on appeal. It was held that the surety was liable and the upper court agreed. The action was in bankruptcy and the equity powers of the court to award fees and costs for the preservation of a common fund was not before the court.

EXHIBIT "G".

DISTINGUISHING RESISTOR'S CITATIONS UNDER POINT VII.

In Re Pacific Coast Building-Loan Association of Los Angeles, 99 Pac. 2d 261, 15 Cal. 155 (1940)

The Building and Loan Commissioner as liquidator of the association, petitioned the Superior Court for instructions concerning the ranking of claims and invited claimants to appear. Claimants' later petition for attorney fees disallowed.

The court said (p. 263) the proceeding was not a suit to protect a common fund, which had been made available by the Commissioner—not by counsel for appellants. It was not a representative class suit. The efforts of counsel for appellants were not necessary to create or preserve the fund nor was there any charge that the Commissioner's conduct was such that the fund would be dissipated or lost. We have no argument with this decision. It bears no similarity to the case at bar.

There had been no seizure of a solvent institution without notice or hearing.

Bank of America N. T. S. A. v. *West End Chemical Co. et al.*, 100 Pac. 2d 318 (D. C. Cal. 1940).

Plaintiffs sued in behalf of a few preferred stockholders as against common stockholders and remaining preferred stockholders, who were represented by opponents. Plaintiffs did not create nor preserve fund. Entirely an adversary proceeding which distinguishes this case from the general equity rule. Hence held trial court did not abuse its discretion. Factual situation entirely different in case at bar.

Lea v. *Patterson Savings Institute*, 142 F. 2d 932 (CCA 5th).

Municipal Bankruptcy proceeding. Statute prohibited attorneys' fees, Court says:

> "Every element ordinarily present in proper case for the allowance of attorneys' fees is absent from this one."

An adversary proceeding.

Standard Lumber Co. et al. v. *Interstate Trust Co. et al.*, 82 F. 2d. 346.

An adversary proceeding, not a class suit and has already been discussed in Exhibit "E" hereto attached.

General Finance Corp. v. *New York State Rys.* 3 F. Supp. 975 D. C. N. Y. (1933).

Action by attorney for fees for services before a special Master in Equity resulting in the allowance of claims of some preferred creditors in a fund. The services of applicant did not result in preserving, creating or securing the fund, which was already in the hands of the Master and hence petition disallowed.

This was an adversary proceeding. Not in point.

Wood v. *Central of Georgia Ry.*, 100 F. 162, 165 5 CCA (1900).

Proceeding for fees for solicitors in equity following a case for reorganization of railroad. The bonds were already in the hands of the receiver who had his own counsel and as there was no showing that the fund needed any protection, fees were not allowed from the insolvent railroad funds. There was no seizure of a solvent institution without notice there.

EXHIBIT "H".

DISTINGUISHING RESISTOR'S CITATIONS UNDER POINT VIII.

Lea v. *Patterson Sav. Institute, et al.*, 142 F. 2d. 932 (CCA 5th).

This case has been discussed in Plaintiff's Exhibit "G" attached hereto, AND in Paragraph "H" of Plaintiff's Point IV.

Tulare County v. *City of Dinuba*, 270 P. 201 (Cal. S. Ct. 1928).

This case has been fully discussed and distinguished in plaintiff's Closing Points and Authorities under Paragraph "H" of Point IV.

Williamson v. *Los Angeles County Flood Control District*, 109 F. 2d. 992 (Cal. App.).

This case is discussed fully in plaintiff's Closing Points and Authorities under Paragraph "E" and in Exhibit "E" of Point IV.

Hubbard v. *Comperdown Mills*, 1 SE 5 (S. Ct. 1886).

Attorney fees for minority stockholders from funds of insolvent bankrupt corporation disallowed. Decision prior to Ticonic Bank case.

This case is discussed fully in plaintiff's closing Points and Authorities under Paragraph "H" of Point IV.

FILE COPY

APPENDIX

No. 133, Misc.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

EX PARTE JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION

IN THE MATTER OF THE PETITION OF JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONERS

FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

against

THE HONORABLE PIERSON M. HALL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND THE CLERK AND OTHER OFFICERS OF SAID COURT

APPENDIX TO PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION

1 In the District Court of the United States, Southern District of California, Central Division

PAUL MALLONEE ET AL., PLAINTIFFS

vs.

JOHN H. FAHEY ET AL., DEFENDANTS

Order directing hearing of the motions of the Shareholder Members Protective Committee, the Long Beach Federal Savings and Loan Association, and Title Service Company for interim orders approving and allowing costs and expenses and attorneys' fees paid or incurred, and directing notices of said hearing

There having been filed in the above entitled proceeding the verified petition of Shareholder Members Protective Committee and the verified petition of The Long Beach Federal Savings and Loan Association, and the verified petition of the Title Service Company, for interim orders approving and allowing expenses and attorneys' fees incurred by them in connection with and incidental to these proceedings both in this court and in the Supreme Court of the United States of America;

Now, therefore, it is hereby ordered:

That a hearing upon said petitions be and the same is hereby set for the 24th day of March 1947, at the hour of 10 o'clock A. M. in the courtroom of Peirson M. Hall, Judge in the Federal Building at Los Angeles, California; that notice of the filing of said petitions and of said hearing be given by the Shareholders Protective Committee to all parties who have appeared in this action by service of a copy of this order upon their respective solicitors or attorneys, and further that the Shareholders Protective Committee give public notice of the filing of the said petitions and of said hearing by publication of this order by one insertion on or before the 12th day of March 1947 in each of the following newspapers of general circulation in the County of Los Angeles, State of California:

2 1. Long Beach Independent.
2. Long Beach Press Telegram.
3. Los Angeles Daily Journal.

Dated at Los Angeles, California, this 6th day of March 1947.

(S) Peirson M. Hall,
PEIRSON M. HALL,
Judge of the District Court.

729620—47——1

3 In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421 P. M.

Notice of hearing of

1. Plaintiffs Motion for Interim Allowance of Expenses and Attorney's Fees Incurred by Plaintiffs as Shareholder Members Protective Committee, Suing as Representatives of the Shareholder Members of the Long Beach Federal Savings and Loan Association.

2. Motion for Allowance on Account of Attorneys' Fees and Expense, and Payment Thereof, by Title Service Company, Defendant, and Cross-Claimant in Interpleader.

3. Defendant, Cross-Claimant and Third Party Plaintiff, Long Beach Federal Savings and Loan Association Motions for Allowance on Account of Fees for Its Attorneys.

PAUL MALLONEE, C. W. NEWHOUSE, AND WINNIE BUCKLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR, AND ON BEHALF OF, ALL THE MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT

4 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

R. H. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

"SUB NOMINAE"

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANT

vs.

JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, FEDERAL HOME LOAN BANK OF PORTLAND, AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ALL ORGANIZATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES, THIRD PARTY DEFENDANTS

5 FEDERAL HOME LOAN BANK OF LOS ANGELES, A BODY CORPORATE, THIRD PARTY DEFENDANT AND CROSS-CLAIMANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES KNOWN AND REFERRED TO AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, A BODY CORPORATE, JOHN H. FAHEY, INDIVIDUALLY AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, AND PURPORTEDLY SERVING AS FEDERAL HOME LOAN BANK COMMISSIONER, CROSS-DEFENDANTS

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

NOTE: There were 9 or more other Intervenors not herein named.

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

ROBERT H. WALLIS, THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

6 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

To JOHN H. FAHEY, *Individually, and as Chairman of the Federal Home Loan Bank Board and Purportedly Acting as Federal Home Loan Bank Commissioner, Defendant, and*

A. V. AMMANN, *Individually, and as Purported Conservator of the Long Beach Federal Savings and Loan Association, Defendant, and*

JAMES M. CARTER, *United States Attorney, for the Southern District of California, Central Division and to Ronald Walker, Assistant United States Attorney for Said District, Their Attorneys of Record.*

FEDERAL HOME LOAN BANK OF LOS ANGELES, *a Body Corporate, and O'Melveny and Myers and Richard Fitzpatrick, Their Attorneys of Record.*

FEDERAL HOME LOAN BANK OF PORTLAND, *Sometimes Known and Referred to as Federal Home Loan Bank of San Francisco, a Body Corporate, and Hoffmann and Bishop, Their Attorneys of Record.*

TITLE SERVICE COMPANY, *a Corporation, Defendant and Third Party Plaintiff, and Thomas & Wallace, Their Attorneys of Record.*

7 ROBERT H. WALLIS, *Defendant and Third Party Plaintiff, and Raymond Tremaine, His Attorney of Record.*

PAUL MALLONEE, C. H. NEWHOUSE, and WINNIE BUCKLIN, *Individually and as Representatives of a class of Shareholder Members of the Long Beach Federal Savings and Loan Association, an Association organized and existing under and by Virtue of the Laws of the United States of America, Plaintiffs, and Westover & Smith, Their Attorneys of Record.*

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *Defendant, Cross-Claimant, and Third Party Plaintiff, and Charles K. Chapman, its Attorney of Record.*

You and each of you will please take notice that at the United States Federal and Post Office building, city of Los Angeles, State of California, the Plaintiffs, Paul Mallonee, C. H. Newhouse, and Winnie Bucklin, et al., will appear, and defendant and cross-claimant in Interpleader, Title Service Company, will appear, and the defandant Long Beach Federal Savings and Loan Association will appear in the District Court of the United States, Southern District of California, Central Division, before the Honorable Judge Pierson H. Hall at Court Room No. Three on the 24th day of March 1947, at the hour of 10 o'clock A. M., of said day or as soon thereafter as counsel can be heard and will then and there present to the Honorable Court their Motions for Allowances on Account of Fees for their respective Attorneys.

Said Motions are made and based upon the records, files, and proceedings herein, and the supporting affidavits attached hereto.

Dated this 6th day of March 1947.

8

WESTOVER & SMITH,
(S) Wyckoff Westover,
By WYCKOFF WESTOVER,
Attorneys for Plaintiffs Paul Mallonee et al.,

THOMAS & WALLACE,
(S) H. O. Wallace,
By H. O. WALLACE,
Attorneys for Defendant and Cross-Claimant in Interpleader,

The Title Service Company.
(S) Charles K. Chapman,
CHARLES K. CHAPMAN,
Attorney for defendant,
Long Beach Federal Savings and Loan Association.

9

WESTOVER & SMITH
1007–1015 Pacific Southwest Bldg.
215 West Sixth Street
LOS ANGELES 14, CALIFORNIA
Phone: Trinity 8791

In the District Court of the United States in and for the Southern District of California, Central Division

Civil File No. 5421 P. M.

PAUL MALLONEE, C. H. NEWHOUSE AND WINNIE BUCKLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR AND ON BEHALF OF ALL OF THE SHAREHOLDER MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, AN ASSOCIATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES OF AMERICA, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY AND A. V. AMMANN, AS THE PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY SUED HEREIN AS JOHN DOE ONE (CROSS-CLAIMANT IN INTERPLEADER), R. H. WALLIS, SUED HEREIN AS JOHN DOE TWO (CROSS-CLAIMANT IN INTERPLEADER), ET AL., DEFENDANTS

10 "SUB NOMINAM"

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK, ET AL., THIRD PARTY DEFENDANTS

ROBERT H. WALLIS, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

FEDERAL HOME LOAN BANK OF LOS ANGELES, ETC., THIRD PARTY DEFENDANT AND CROSS-COMPLAINANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES KNOWN AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL., THIRD PARTY CROSS-DEFENDANT

11 *Motion for interim allowance of expenses and attorneys' fees incurred by plaintiffs as Shareholder Members Protective Committee, suing as representatives of the Shareholder Members of the Long Beach Federal Savings and Loan Association*

To the Honorable PEIRSON M. HALL, *Judge of the United States District Court for the Southern District of California, Central Division:*

Come now the plaintiffs and make this their motion for and interim order of this Honorable Court fixing, determining, allowing, and ordering payment on account to these plaintiffs and to their attorneys for expenses and attorney's fees incurred prior to March 1, 1947.

It is respectfully requested that this Honorable Court fix a time and place for a hearing on this motion and make its order directing the terms and conditions of the notice to be given of the hearing on this motion.

For the grounds of this motion, *the plaintiffs state that:*

I

The unauthorized seizure on May 20, 1946, of the Long Beach Federal Savings and Loan Association by the defendant A. V. Ammann made it absolutely necessary for a shareholder members' protective committee to be formed and take prompt action, as has been done, by the retaining of counsel and the institution of this litigation in an attempt to protect and preserve the assets of this $26,000,000 solvent institution from being dissipated by the unauthorized trespasser who seized its assets under the guise of a void attempted appointment as conservator by a one-man dictator who claims to have acted under his own self-enacted laws.

The attempted appointment of the defendant A. V. Ammann as conservator was bottomed solely upon the provisions of
12 Section 5 (d) of the Home Owners Loan Act of 1933, which have heretofore been declared unconstitutional by the unanimous opinion of the Statutory Court composed of three judges convened for the specific purpose of passing upon the constitutionality of such challenged enactments of Congress. In spite of the prompt action of this shareholder members' committee to prevent the complete destruction of said association by the activities of the interloper defendants A. V. Ammann and John H. Fahey, and in spite of the best efforts of this Honorable Court, the activities of the defendant trespasser interlopers A. V. Ammann and John H. Fahey have resulted in the diminishing of the shareholders' savings accounts of said association by more than ten millions of dollars.

To prevent the further and complete destruction of said association and the dissipation of its assets, it is necessary for this shareholder members' committee to continue its efforts to uphold and support on appeal before the Supreme Court of the United States of America, the opinion and judgment of the said Statutory Three-Judge Court, which properly declared said Section 5 (d) of the Home Owners' Loan Act of 1933 unconstitutional, as being an attempted unlimited delegation of legislative authority, without any of the safeguards of due process required by the United States Constitution.

II

That the plaintiffs, hereinafter called "Petitioners," Paul Mallonee, C. H. Newhouse, and Winnie Bucklin, individually and as

representatives of a class, have heretofore brought suit, for and on behalf of all the shareholder members of the Long Beach Federal Savings and Loan Association; at the time of the unlawful seizure hereinafter mentioned, the shareholder members of said association numbered in the aggregate approximately sixteen thousand (16,000), and it was therefore impractical to join each and all of such shareholder members as parties plaintiff or de-
13 fendant in this said action; since the seizure of said association, the petitioners, the Shareholder Members' Protective Committee, has been, and is being continuously given signed authorizations by a large proportion of the shareholder members of said Long Beach Federal Savings and Loan Association so that this committee, the petitioners, are truly representative of the majority of the savings account shareholder members of the said association.

III

History of Case

Briefly, the facts giving rise to this litigation are:

That on May 20, 1946, pursuant to an admittedly unsigned order purportedly appointing him the Conservator, the defendant, A. V. Ammann, forcibly and without prior notice or hearing suddenly seized the solvent Long Beach Federal Savings and Loan Association, attempting to dispossess its elected officers, and by purported rules and regulations attempted to deprive them of all authority and to thus prevent their testifying before a Congressional Investigating Committee, and to prevent their filing appropriate litigation for the recovery of over $380,000 book value of stock owned by the Association in the Los Angeles Federal Home Loan Bank which had been previously seized by the other defendant, John H. Fahey, who had on March 29, 1946, seized, without cause or notice, the solvent Federal Home Loan Bank of Los Angeles and on that day had attempted to instantaneously dissolve, liquidate, transfer, merge, and commingle all of its more than $43,000,000 in assets, including nearly $2,000,000 of undivided profits, with the approximately $9,000,000 of assets of the Federal Home Loan Bank of Portland, and thereafter renamed the commingled assets the Federal Home Loan Bank of San Francisco.

These seizures of these two entirely solvent financial institutions in Southern California were for the purpose of forcing the directors of the Federal Home Loan Bank of Los Angeles
14 to accept the dictation of the defendant John H. Fahey as to who should be president of that Los Angeles Federal Home Loan Bank, and these seizures were made to carry into effect his policy of "rule or ruin."

The Long Beach Federal Savings and Loan Association, under the continuous management of its same officers, had grown from a $7,500 financial institution in 1934 to a $26,000,000 institution in 1946, while continuously paying dividends of from 2½% to 4% per annum to its shareholder members and when seized had a surplus of undivided profits of more than $1,300,000, and at the time of seizure was not being financed in any way by any money of the government, nor any of its agencies, its capital consisting solely of the mutual savings of its approximately 16,000 shareholder members, residents of Southern California.

The Long Beach Federal Savings and Loan Association, at the time of seizure, had outstanding loans amounting to approximately $12,000,000 secured by trust deeds on approximately 8,000 parcels of real property in Southern California.

On May 20, 1946, immediately following the seizure of the Long Beach Federal Savings and Loan Association, investigation was commenced by various shareholder members and shortly thereafter the formation of a Shareholder Members Protective Committee was commenced, the firm of Westover & Smith retained and the Committee when formed immediately filed this action No. 5421-PH praying for the removal of the purported Conservator, the restoration of the duly elected officers of said Association to the possession of its assets, for an accounting and for appropriate injunctions to protect the assets of the Association and its members from being dissipated, which action was primarily based upon the theory that the purported rules and regulations under which the purported Conservator A. V. Ammann was appointed were invalid and his appointment invalid on several grounds including the ground that Section 5 (d) of the Home Owners Loan Act was repugnant to the United States Constitution as being an unlimited delegation of legislative authority and contrary to the constitutional requirements of due process.

As a result of this petitioners' prompt action, this Honorable Court has been able to issue appropriate injunctions preventing the merger and dissipation of the assets of the Association, at least in part, and there have been various appropriate interpleader actions and intervention actions in this main action and there is now on deposit with the registry of this Court moneys of the said Association aggregating in excess of $800,000; that numerous motions were made supported by voluminous affidavits and extensive hearings and arguments were held which resulted in this Honorable Court rendering its opinion on September 5, 1946, holding, "Section 5 (d) of the Home Owners Loan Act of 1933, as amended, unconstitutional and void as attempting to delegate legislative power"; thereafter on September 30, 1946 after further motions, and a request for stay of execution had been heard and

denied this Honorable Court entered its judgment and decree ordering, among other things, the dispossession of the defendant A. V. Ammann as Conservator and the immediate restoration to possession of the duly elected officers of the Long Beach Federal Savings and Loan Association.

That the defendants, A. V. Ammann and John H. Fahey, obtained a stay of execution from the United States Supreme Court and thereafter filed their appeal to the U. S. Supreme Court from this Honorable Court's Decree and Judgment. That in spite of the best efforts of this Shareholder Members Protective Committee and of this Honorable Court, the savings account deposits in said Long Beach Federal Savings and Loan Association have diminished by more than $10,000,000 while under the control of the defendant, A. V. Ammann, as purported Conservator.

That it is necessary that this Shareholder Members Protective Committee, the plaintiffs, herein, continue to oppose the actions of the defendants, A. V. Ammann and John H. Fahey and
16 respond to the appeal taken by them to the United States Supreme Court and endeavor to support and uphold the judgment of this Honorable Court and to continue to endeavor to protect said Long Beach Federal Savings and Loan Association and its assets from the dissipation by defendants, A. V. Ammann and John H. Fahey.

The Shareholder Members Protective Committee retained and employed the firm of Westover & Smith, members of the California Bar, to represent said Committee and said Committee has at all time been represented by the firm of Westover & Smith in all of said proceedings; and that said Westover & Smith have also associated with them Mr. Daniel W. O'Donoghue, Jr., a member of the Bar of the Supreme Court of the United States, and of Washington, D. C. as resident counsel in Washington, D. C.

That innumerable and novel problems have arisen in connection with the above litigation which have required the constant legal attention of counsel; and that Wyckoff Westover, a member of the Bar of the State of California and now a member of the Bar of the United States Supreme Court has been required to, and has, devoted substantially all of his time to this litigation and from time to time, as required, has been assisted by other counsel in matters of research, drafting of documents, and other necessary legal work. That frequently time has been of the utmost importance in said litigation, and that therefore much time has been spent by counsel on holidays, Sundays and even throughout the night in endeavoring to promptly do the necessary legal work involved in this litigation.

That the magnitude of this litigation and the complexity of the numerous and novel problems, arising therein, have necessitated

and required comprehensive and exhaustive research far beyond that involved in the ordinary litigation.

That all actions and things done by the plaintiffs, the petitioners herein, the Shareholder Members Protective Committee, have been done for and on behalf of all shareholder members
17 of the Long Beach Federal Savings and Loan Association and have been for the purpose and have had as their objective the saving of the said Association and its assets from destruction by the defendants, A. V. Ammann and John H. Fahey, and have been for the purpose of restoring the said Association and its assets to the management and control of the shareholder members of said Association by and through their duly elected officers and directors whoever they may be.

That the three plaintiffs, Paul Mallonee, C. H. Newhouse, and Winnie Bucklin, who compose the Shareholder Members Protective Committee are in no way seeking, nor will they at any time seek remuneration for their personal services and the benefits which will accrue to them personally are only such benefits as will accrue to all shareholder members of the Long Beach Federal Savings and Loan Association by the preservation of its assets from being dissipated and destroyed by the trespasser interlopers, the defendants John H. Fahey and A. V. Ammann.

This Honorable Court has from the inception of this litigation been in close contact with the various problems and various counsel involved and it would be impractical and, we believe, unnecessary for the aid of the Court in passing upon this petition to attempt to enumerate in detail all problems and the exact nature of all services rendered by the petitioners Shareholder Members Protective Committee and their Counsel.

Therefore, these petitioners and their counsel will limit themselves to a general summary of the services rendered by the said Shareholders Members Protective Committee and their Counsel and the liabilities and expenses incurred in connection therewith and will make no attempt to describe in detail such services, as to do so would make this motion unduly voluminous.

IV

Shareholder Members Protective Committee

After preliminary discussions, investigation and research as to the constitutional questions involved and the necessary
18 procedure to be followed a Shareholder Members Protective Committee was organized to represent the Shareholder Members of the Long Beach Federal Savings and Loan Association which Committee retained the firm of Westover & Smith, and application was thereafter duly made to the Corporation Com-

missioner of the State of California, and on June 17, 1946 License No. 80282LA was issued by the Division of Corporations, State of California, licensing Paul Mallonee, C. H. Newhouse, and Winnie Bucklin to act as a Shareholder Members Protective Committee to act for and to represent the shareholder members of the Long Beach Federal Savings and Loan Association; and thereafter, organization and other meetings of such Shareholder Members Protective Committee were duly held and the Committee ratified and confirmed the employment of Westover & Smith as general counsel for the Committee and authorized them as general counsel to continue to take such action as they deemed to be advisable and proper on behalf of the Shareholder Members Protective Committee to protect the interests of the shareholder members of the Long Beach Federal Savings and Loan Association, within the means available to said Committee.

With the assistance, advice, and counsel of the firm of Westover & Smith, Esquires, the Shareholder Members Protective Committee proceeded to have authorizations and proxies printed and circulated to such members of the Long Beach Federal Savings and Loan Association as cared to join with the Shareholders' protective Committee in protecting the interests of the shareholder members of the Long Beach Federal Savings and Loan Association.

Throughout the entire litigation the Shareholder Members Protective Committee has remained active and, so far as information could be obtained, has endeavored to maintain a list of shareholder members of the Long Beach Federal Savings and Loan Association, a list of those who have filed their authorizations and proxies, with the committee and the committee has at all times maintained offices, and has had a staff of stenographers,
19 secretaries, and an office manager; has endeavored to keep the shareholder members of the Long Beach Federal Savings and Loan Association fully advised of the progress of the said litigation and has at all times maintained a stenographic pool for the preparation and reproduction of legal documents, statements, drafts, affidavits, pleadings, points and authorities, arguments, and to aid and assist the attorneys in the preparation and reproduction of such documents as were deemed advisable and necessary, and the said stenographic pool under the supervision of the said Committee and its attorneys have aided and assisted such other parties and attorneys as have had compatible interests and objectives not contrary to, or in conflict with, the interests of the shareholder members of the Long Beach Federal Savings and Loan Association in the maintaining and preserving of the assets of the association and its good name; the said stenographic pool maintained by the Shareholder Members Protective Committee has prepared and reproduced the record of this litigation for the

aid and assistance of this Court and the United States Supreme Court and for the attorneys of the various parties litigant who have compatible interests and objectives not adverse or in conflict with the interests and objectives of the shareholder members of the Long Beach Federal Savings and Loan Association.

That said Shareholder Members Protective Committee, the plaintiffs herein, for and on behalf of, and for the benefit of all the Long Beach members of the Long Beach Federal Savings and Loan Association has incurred and become liable for substantial sums of money for printing, stationery, telephone, telegram, office expense, salaries, wages, attorneys' fees, office overhead, and other expenses, far above and beyond the expenses normally designated as costs, all of which expenses have been incurred in connection with the successful prosecution of this litigation.

20

V

INVESTIGATION AND COMPLAINT

That upon being retained by the Shareholder Members' Protective Committee it became necessary for the attorney retained by said Committee to act with great dispatch and to investigate, prepare, draft, file, and have issued appropriate restraining orders, all within a very short period of time in order to prevent the defendants, A. V. Ammann and John H. Fahey, from merging, consolidating, and commingling the assets of the Long Beach Federal Savings and Loan Association with other organizations and associations, thus dissipating such assets as had been done by these same defendants, A. V. Ammann and John H. Fahey, when they previously had transferred, consolidated, and commingled the assets of the Federal Home Loan Bank of Los Angeles with the much smaller Bank, to wit; the Federal Home Loan Bank of Portland, all on the same day, to wit March 29, 1946.

The firm of Westover & Smith immediately upon their being retained therefor, employed other counsel, augmented their stenographic staff, and within a few days were able to and did, preliminary research and investigation, and drafted the complaint and appropriate motions for temporary restraining orders with supporting documents and filed the same on May 27th, 1946.

VI

For the reasons above set forth, it was necessary to immediately obtain, and there was obtained, from this Honorable Court a Temporary Restraining Order restraining the defendants, A. V. Ammann and John H. Fahey, and their agents from merging and

commingling the assets of the said Long Beach Federal Savings and Loan Association with other associations and thereby these defendants, A. V. Ammann and John H. Fahey, were temporarily prevented from dissipating the assets of said association. Hearings were had pursuant to law on said Temporary Restraining
21 Order and the matter continued from time to time and said order maintained in full force and effect while motions were being prepared and made for the appropriate temporary injunction restraining the merger of said Association.

VII

The attorneys for said Shareholder Members Protective Committee were immediately confronted with the problem of whether or not the action was a local action properly to be brought within this jurisdiction or whether the said action would have to be brought under Federal Rules in Washington in the District of Columbia which, of course, would have made such action totally ineffectual as the District Court of the District of Columbia, sitting in Washington, D. C., could not properly handle the various problems arising affecting the title to real estate located in Southern California, some three thousand miles away.

In order that the action should be locally effective to clear the titles of some eight thousand parcels of local real estate involved, and not merely a legal action without purpose or meaning, there was undertaken considerable research on the question of local actions with the result that it was deemed necessary and advisable to make the trustee of the trust deeds a party defendant to said action. Therefore the Title Service Company, the trustee of most of said eight thousand trust deeds, was served by the marshal and made a party defendant; the Title Service Company answered by a Bill of Interpleader interpleading some one hundred seventy-four (174) notes and trust deeds having an unpaid balance of nearly $800,000, and by a Bill in the Nature of Interpleader listing all other trust deeds on which the Title Service Company was trustee and which would be affected by this litigation, comprising about eight thousand (8,000) notes and trust deeds having a valuation of approximately $12,000,000. Lis Pendens listing said property were filed concurrently therewith by the Title Service Company.

VIII

Alias summonses were issued and served, together with a copy of the complaint upon Mr. Robert H. Wallis which resulted in his forthwith interpleading into said action and depositing with the Registry of said Court a certified check from said Association

to himself in the amount of Fifty Thousand Dollars ($50,000), which said $50,000 check had been given by the officers of said Association to the Interpleader Robert H. Wallis, their attorney, to be expended by him for expenses, retainer fees, and attorneys fees in connection with litigation that was expected by them to be necessary to defend the Long Beach Federal Savings and Loan Association from the attacks upon said association then being made, and contemplated to be made, by the defendant, John H. Fahey, and the Federal Home Loan Bank Administration of which he was the purported Commissioner and Dictator.

That said $50,000 check had been delivered to the interpleader, Robert H. Wallis, pursuant to a resolution duly adopted by the Board of Directors of the Association budgeting up to $100,000 for the said purpose of defending the Association against the attacks then being made and which it was contemplated were to be made by the defendant, John H. Fahey, and the Federal Home Loan Bank Administration, upon the said Long Beach Federal Savings and Loan Association.

IX

Shortly after the filing of the instant litigation, to wit, on June 5, 1946, the Federal Home Loan Bank Administration issued its purported, but unsigned, order No. 5309 for the holding of a purported hearing at which certain parties were invited to appear and "show cause why the Conservator should not have been appointed and why an order should be entered by the Home Loan Bank Administration discharging the Conservator."

The purported hearing was to be held before an employee
23 of the Home Loan Bank Administration as a purported hearing officer and such purported hearing officer did "not have power to decide any motion to dismiss the proceedings or other motion that involves final determination of the ultimate issue" but did only have power to transmit to the Secretary of the Federal Home Loan Bank Administration a transcript of the testimony taken, and the final determination would, therefore, rest with the same person, to wit the defendant, John H. Fahey, as Administrator and dictator of the Federal Home Loan System who had for himself for his own personal reason previously appointed the defendant, A. V. Ammann, as Conservator.

The plaintiff, Shareholder Members Protective Committee, was not given notice of said purported hearing nor invited to appear at the same, nor were the shareholder members of the Long Beach Federal Savings and Loan Association given notice of said purported hearing.

It therefore, being apparent that such hearing would be a hearing in name only and not an impartial tribunal and that such hearing would be a duplication and an encroachment upon the jurisdiction of this Honorable Court and an attempt to collaterally have decided by the party defendant, John H. Fahey, himself the same questions being submitted to this Honorable Court for decision, it was necessary for and the plaintiff herein did, through its counsel, make appropriate motion, supported by necessary affidavits and documents for an order restraining the holding of said hearing and there was issued by this Honorable Court a Temporary Restraining Order restraining the holding of said purported hearing, and subsequently appropriate motions for injunctions restraining the holding of said hearing were made, argued, submitted, and ultimately, this Honorable Court issued its Injunction enjoining the holding of said hearing.

24 X

By reason of the unlawful, unauthorized, and illegal appointment of A. V. Ammann, Conservator of the Long Beach Federal Savings and Loan Association, and by reason of his forcible seizure and taking possession of said Association and its assets and his attempt to trespass upon and deal with the assets of this said Association and particularly the trust deeds upon California real estate, his said actions caused a cloud to be cast upon the title to some 8,000 parcels of real estate in Southern California, accruing notes payable to the Long Beach Federal Savings and Loan Association having a valuation of approximately $12,000,000. That among other parcels of real-estate titles, which were so clouded by said defendant A. V. Ammann, by his actions as purported Conservator, were some one hundred seventy-four (174) parcels of real property owned by Home Investment Company who desired to clear the title to their said properties and to pay off said loan and to assist them in so doing, the Title Service Company, Trustee of said trust deeds, filed its Bill in the Nature of Interpleader, listing all parcels of real property on which trust deeds naming Title Service Company as Trustee were of record, to wit, approximately eight thousand (8,000) parcels and thereafter, the Home Investment Company asked leave and was permitted to intervene in said action which resulted in arrangements being worked out whereby, pursuant to appropriate court order, there was deposited in the Registry of this Honorable Court nearly $800,000 and appropriate reconveyances issued for said one hundred seventy-four (174) parcels of real property.

Subsequently numerous other parties owning real property in Southern California have intervened in said action and there con-

tinues to be numerous Motions for Intervention being filed from time to time by the owners of real property in Southern California.

That Counsel for the Shareholder Members Protective Committee, together with other counsel engaged in this litigation, have spent a great deal of time and continue to spend a great deal of time in conferences, consultations, appearances in Court, and otherwise working out and endeavoring to expedite the necessary legal arrangements for clearing the title to the real property involved in such interventions. That the number of such intervention motions and actions is too numerous to list herein, but records thereof are available in the records of this litigation.

Additional amounts of money paying off the notes of said intervening parties have been and are continuing to be, from time to time, deposited in the Registry of this Court so as to keep said funds available for ultimate disposition by this said Honorable Court.

XI

That thereafter the defendant Long Beach Federal Savings and Loan Association, in addition to filing its Answer, filed a Cross-claim against The Federal Home Loan Bank of Los Angeles, The Federal Home Loan Bank of Portland, and The Federal Home Loan Bank of San Francisco, joining them and making them Third Party Defendants, after leave first had and obtained from this Honorable Court pursuant to whose order the said Federal Home Loan Bank of Los Angeles, the said Federal Home Loan Bank of Portland, and the said Federal Home Loan Bank of San Francisco were found to be necessary and proper parties to the complete and final determination of the above action.

That the questions raised by said cross-claim and the joining of said cross-defendants and Third Party Defendants have raised numerous and complex issues and legal questions which have required extensive investigation and research by the plaintiffs and their counsel. There are still pending before this Honorable Court various and numerous motions by the said Federal Home Loan Bank of San Francisco which have already required extensive research and investigation by counsel for the plaintiff and will require further extensive research, arguments and hearings before said motions are finally submitted to this Honorable Court for its determination.

XII

That numerous and various motions by the defendants, A. V. Ammann and John H. Fahey, respectively, to dismiss the com-

plaint and/or to quash service upon the said John H. Fahey have been filed by the respective defendants, A. V. Ammann and John H. Fahey, and that it therefore became necessary for and there has been filed on behalf of the plaintiff Shareholder Members Protective Committee, by its counsel, numerous and exhaustive Points and Authorities, Statements in Opposition, with supporting Affidavits resisting said Motions to Dismiss this Complaint and the interrelated Bills of Interpleader and Intervention; that said Motions of Dismissal and to Quash service were argued and extensive Points and Authorities filed and ultimately said Motions to Dismiss and Quash Service were denied by this Honorable Court.

XIII

That the various Motions to Dismiss, Motions for Restraining Orders and Injunctions to prevent merger and to enjoin the holding of prejudicial unauthorized collateral administrative hearings, following the filing of voluminous Affidavits and extensive Points and Authorities, and arguments were ultimately heard by a statutory court composed of Judges: The Honorable William E. Orr, United States Circuit Judge; the Honorable David W. Ling, United States District Judge; and the Honorable Pierson M. Hall, United States District Judge.

XIV

Following the extensive arguments, pursuant to the request of said Honorable Court, Points and Authorities summarizing
27 the various arguments of counsel for the various parties were prepared and filed.

The constitutional questions involved and the magnitude of the litigation and the importance of its effect upon the entire Federal Home Loan Bank System and in fact, its importance to the Nation at large, necessitated and justified exhaustive research and the filing of comprehensive Points and Authorities, which was done by the various counsel for the various parties.

XV

After due consideration the said statutory three-judge Court rendered its opinion to the effect that the attempt by Congress, by the enactment of Subdivision (d) of Section 5 of the Home Owners Act of 1933, as amended, to delegate legislative power without provision for due process, was repugnant to the Constitution of the United States and that therefore said Subdivision (d) of Section 5 of said Home Owners Loan Act of 1933, as amended,

was unconstitutional. That the attempt to appoint a Conservator under rules and regulations bottomed upon said unconstitutional section was ineffectual and void.

Thereafter, judgment for the dispossessing of said trespassing Conservator, the Defendant A. V. Ammann was duly prepared by counsel for plaintiffs and submited to the Court, but the entry of said Judgment was opposed by the defendants A. V. Ammann and John H. Fahey, in an attempt by them to continue to retain possession of the said Long Beach Federal Savings and Loan Association and its assets which were being rapidly depleted, and further extensive statements and Points and Authorities in Opposition to said Judgment were filed by the defendants, John H. Fahey and A. V. Ammann and duly answered by the plaintiffs, through their counsel by adequate counter statements and points and authorities in support of the judgment as prepared by plaintiffs counsel.

In an effort to expedite the restoration of possession of
28 said Federal Savings and Loan Association and in an effort to preserve the association and its assets from further depletion and to restore the management of the association and its assets to the duly elected officers of said Association these petitioners through their counsel filed appropriate motions for a mandatory injunction to dispossess the trespassing Conservator A. V. Ammann, and to enjoin him from interfering with the *proper* management of said Association by its duly elected officers and directors.

Extensive Affidavits, supporting statements and Points and Authorities were duly filed and answered by the counsel for the respective parties in the litigation and extensive hearing was had on the said Motion of these plaintiffs.

After extensive argument, this Honorable Court denied said Motion, carefully basing its denial upon the lack of jurisdiction, in that substantially the same subject matter had been passed upon and included in the opinion of the three-judge statutory court previously rendered.

XVI

In an effort to further delay their dispossession and to continue to retain possession of the said Association and its assets the defendants, A. V. Ammann and John H. Fahey, filed their Request for Stay of Execution, to which counsel for the plaintiffs and counsel for other parties in the litigation filed opposition statements supported by appropriate Points and Authorities and after due deliberation the statutory three-judge court duly denied the defendants, A. V. Ammann and John H. Fahey's request for Stay of Execution, and immediately thereafter the arguments in relation to the form of said judgment having been thoroughly heard and considered, the statutory three-judge court signed and ordered

entry of the judgment which had been duly prepared by counsel for the prevailing parties; thereafter Writ of Possession to restore the duly elected officers of said Association to the possession,
29 management, and control of said Association and its assets was issued and served by the marshal under the direction of counsel for these petitioners.

XVII

Under the opinion of the Statutory Court composed of three judges, and while proceedings were being held for the settlement of the form of decree to be entered, it became apparent that the defendants John H. Fahey and A. V. Ammann would appeal the interlocutory judgment to the United States Supreme Court, and it further became necessary for resident counsel to be obtained in Washington, D. C. The Honorable Daniel W. O'Donoghue, Jr. was obtained and has acted as associate counsel and resident counsel in Washington, D. C., and has been working for and rendering valuable and extensive services to and for and on behalf of the plaintiffs, the Shareholder Members Protective Committee.

Immediately upon the statutory court, composed of three judges, entering the court's judgment in favor of the plaintiffs and for the restoration of possession to the Association and its Officers of the Association and its assets, the defendants, John H. Fahey and A. V. Ammann prevailed upon the Solicitor General's Office of the United States to make application on their behalf to one of the Justices of the United States Supreme Court for a Stay of Execution, even before the filing of any appeal and even before opportunity was had to transmit to Washington, D. C. the files and records in the litigation, which Stay was forthwith summarily granted by the Honorable Justice Wiley Rutledge of the United States Supreme Court at Washington, D. C. even before local counsel could reach Washington with any of the files, records, or even a copy of the said judgment. It was necessary for local counsel to immediately travel to Washington, which was done. Extensive preliminary conferences were held in Washington, D. C. with resident counsel Daniel W. O'Donoghue, Jr., and work was immediately commenced upon the project of making a
30 typewritten copy of the entire record, pleadings, and so far in the said matter for the use of counsel in Washington and in California and for the preliminary use of the Justices of the United States Supreme Court in the consideration of preliminary motions, which it was necessary to make prior to the time when a printed record on appeal could be perfected. Numerous preliminary conferences both by telephone and person, were held between counsel in Washington, D. C. and in California, all of

which took considerable time; and all counsel, both in Washington and in California, necessarily made the expenditures of considerable sums of money for traveling, hotel bills, telephone, telegraph, and similar justificable items of expense. That the said Honorable Daniel W. O'Donoghue, Jr., a member of the Bar of the Supreme Court of the United States of America, maintaining offices in Washington, D. C., as such associate counsel has rendered valuable and extensive services, and has acquired substantial expenses at the request of and for and on behalf of the plaintiffs, the Shareholder Members Protective Committee, and for the benefit of all of the shareholder members of the Long Beach Federal Savings and Loan Association as more fully set forth in Exhibit "A" attached hereto.

XVIII

The preparation of the necessary required typed record of all pleadings and documents used in the proceeding had in the District Court and before the statutory court composed of three judges, necessitated the employment of a great deal of stenographic and secretarial help by the petitioners, the Shareholder Members Protective Committee.

31 Estimates were first obtained from Parker & Company as to the expense and feasibility, as to time, of printing such a record and the preliminary estimates of such expense given to counsel by Parker & Company showed that the printing of such a record would cost approximately Ten Thousand Dollars ($10,000) and would take two to three months time.

It was therefore deemed advisable to prepare such a preliminary record for the use of the Justices of the United States Supreme Court in considering preliminary motions. By the obtaining of electrical typewriters, the typing of the record was speeded up considerably. The typed record so prepared consisted of more than Thirteen hundred (1,300) pages, even after the elimination of all Points and Authorities. Ten (10) copies of such a typewritten record were deposited with the Clerk of the Supreme Court of the United States and other copies of such record were delivered to the various counsel representing the various parties in the litigation including one copy being delivered to this Honorable Court to replace the copy of the record which was prepared by the Clerk of this Court and forwarded to the Clerk of the United States Supreme Court as the official record.

XIX

The operation of the Long Beach Federal Savings and Loan Association under the management of the purported Conservator,

the Defendant, A. V. Ammann was rapidly resulting in the destruction of the said Association, the loss of savings accounts under his operation amounted to more than $10,000,000 and in numerous other ways was resulting in destroying the confidence of the public in said financial institution; and it, therefore, became necessary to take every possible means for obtaining the immediate discharge of the Conservator and the restoration of the duly elected officers of said Association to its management and control.

Motion was thereafter duly made to Mr. Justice Rutledge
32 of the United States Supreme Court that he vacate and set aside the Stay of Execution previously issued by himself. Affidavits and other supporting documents were duly prepared and filed in support of said motion. Extensive research and investigation was undertaken both of law and facts. It was necessary for local counsel to go to Washington to appear before Mr. Justice Rutledge to argue said motion, and said local counsel did go to Washington, D. C. and after continuations had been granted to appellants, John H. Fahey and A. V. Ammann, did finally argue said motion in Washington, D. C., before the said Honorable Justice Rutledge on November 25, 1946. The defendants, A. V. Ammann and John H. Fahey through the Solicitor General's office, did, at six o'clock in the evening on the Friday preceding the said argument which was set for the following Monday at two o'clock P. M., file a Memorandum in Opposition to the Motion to Vacate said Stay of Execution and included in their Memorandum numerous Affidavits involving totally new matter which said Affidavits alone comprised some eighty-four (84) pages in addition to the twenty-four (24) page Memorandum containing much new hearsay factual matter.

In order to answer the new matter contained in said Affidavits and Memorandum of the Appellants, it was necessary to immediately obtain numerous Affidavits from California residents in reply, which it was obviously impossible to do within the time intervening over Saturday and Sunday. Therefore, pursuant to leave of Mr. Justice Rutledge, first had and obtained, counsel immediately returned to California and responsive Affidavits to such new matter were prepared, executed, by local California residents who had knowledge of the facts and were filed, with Mr. Justice Rutledge. The motion to vacate his previously issued Stay of Execution was then submitted to Mr. Justice Rutledge to the conference of all of the Justices of the United States Supreme Court for their consideration. That further and additional
33 Supplemental Memorandum was filed by the appellants in opposition to the dissolution of the Stay of Execution in Washington on the day before, the matter was considered in conference by the Justices of the Supreme Court which Supplemental

Memorandum was not received by California counsel for your petitioners and the movants of said Motion until after decision had been made by the Supreme Court denying their Motion to Vacate the Stay of Execution and hence there was no opportunity afforded appellees to contradict the incorrect facts therein stated.

XX

That counsel for your petitioners has expended considerable time in reviewing the record giving consideration to the selection of the portions of the record to be printed on appeal and doing preliminary work in connection with the checking to see that the record on appeal as printed by the appellants would be sufficient to constitute a proper record on appeal. This, of course, has been particularly necessary as the appellants saw fit to only designate for printing on appeal a comparatively small part of the record omitting therefrom numerous portions of the record which might be necessary on appeal in order to sustain the jurisdiction of the statutory court composed of three judges in having heard and determined the matter.

In this connection pursuant to the request of the appellants, petitioners' counsel have prepared and obtained signatures of all local California counsel to a suggested Stipulation for Diminution of the Record to be printed on appeal in certain particulars all of which has taken considerable time and substantial amounts of expense.

XXI

That as a result of the seizure of said Association by the defendant John H. Fahey, through his agent the defendant A. V. Ammann, your petitioners have been deprived of having their said Association operated by their duly elected officers and the Board of Directors whom they had elected and the appellees,
34 including these plaintiffs, the defendant Long Beach Federal Savings and Loan Association, and cross-complainants, The Title Service Company and the defendant and cross-complainant Robert H. Wallis, in order to preserve the assets and the business of said association, have been, and are now being and will be, in the future, forced to expend and incur considerable liabilities and expenses for the benefit of all of the shareholder members and creditors of said Long Beach Federal Savings and Loan Association.

That in connection with the operation of the Shareholder Members Protective Committee, the plaintiffs and appellees herein, a great deal of work has been done, offices have been maintained, a staff of secretaries under the supervision of an office manager has been maintained to aid and assist in the preparation of records,

affidavits and aiding and assisting counsel in said litigation, and that the reasonable value of the services so performed, and of the office overhead, equipment, and supplies so supplied, for and on behalf of all the shareholder members and for the benefit of all the creditors of the Long Beach Federal Savings and Loan Association, is as more specifically set forth in the attached statement, marked Exhibit "B", and made a part hereof, the total of which reasonable sums amounts to $15,530.29.

That your petitioners, the Shareholder Members Protective Committee respectfully request: (1) that this Honorable Court after due hearing determine a reasonable amount to allow as an interim allowance on account of the expenses incurred and expended prior to March 1, 1947, by the Shareholder Members Protective Committee in the operation of said Committee and in the preparation of records and affidavits and in assisting counsel in said litigation; and (2) that this Honorable Court make its order directing the clerk to pay from the registry of this court such sums so determined as an interim allowance on account of the expenses incurred and expended, prior to March 1, 1947, by the Shareholder Members Protective Committee in the amount of $15,530.29.

35 XXII

That the attorneys representing your petitioners, the said Shareholder Members Protective Committee have devoted large amounts of time to this said litigation, many times being required to and actually working straight through the night, on holidays, Saturdays, and Sundays, and have made numerous appearances in Court in connection with the said litigation, have made trips to Washington, D. C., which have taken them away from their offices for considerable periods of time and have prevented them from handling litigation for other clients.

That in addition to the time so expended by counsel both in California and in Washington, D. C., such counsel have advanced and incurred and become liable for necessary expenses required in prosecuting this said litigation which expenses are set forth in detail in "Exhibit C," attached hereto and made a part hereof by reference, which expenses incurred by the said firm of Westover & Smith as general counsel prior to March 1, 1947, alone amount to $1,534.77.

That your petitioners, the Shareholder Members Protective Committee respectfully request that this Honorable Court after due hearing determine what would be a reasonable amount to allow as an interim allowance on account for expenses and attorneys' fees for services rendered by general counsel and associate resident Washington counsel in the representation of your

petitioners the Shareholder Members Protective Committee, which services have been rendered in this litigation instituted by your petitioners the plaintiffs, Shareholder Members Protective Committee for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association and for the benefit of all shareholder members and creditors of the Long Beach Federal Savings and Loan Association; that this Honorable Court make its order directing the Clerk to pay from the
36 registry of this court such sums so determined as an interim allowance on account of such attorneys' fees, and on account of the expenses so incurred in the amount of $1,534.77.

XXIII

That there is now on deposit with the registry of this court in the above entitled litigation funds belonging to all of the shareholder members of said Association and subject to the order and disposition of this Honorable Court amounting to approximately $850,000; that since the said funds on deposit with the registry of this court belonging to all of the shareholder members of the Long Beach Federal Savings and Loan Association, and since the instant litigation is a class suit brought for and on behalf of and for the benefit of all shareholder members of the Long Beach Federal Savings and Loan Association and the results accomplished and the orders, injunctions, and decrees made and issued by this Honorable Court have been for the protection of and for the benefit of all of the shareholder members of the Long Beach Federal Savings and Loan Association, and the expenses of this mutually beneficial litigation should equitably be borne by the Long Beach Federal Savings and Loan Association and be ordered by this court to be paid out of the funds of said association amounting to approximately $850,000 now held on deposit with the registry of this court.

XXIV

That this motion will be based upon all the pleadings, records, affidavits, briefs, points, and authorities and documents on file herein, and the affidavits and points and authorities filed herewith.

Wherefore, the petitioners pray that this Honorable Court, without prejudice to future applications to this Court by the plaintiffs or other parties for reimbursement in the future for attorney fees and expenses which may have been or hereafter be paid or incurred and without prejudice as to any amounts which
37 may be ultimately allowed or determined as costs of this litigation to be assessed against any of the parties, make its interim order directing the clerk of this Court forthwith to

pay from the moneys now on deposit with the clerk in the registry of this court belonging to the Long Beach Federal Savings and Loan Association the following:

(1) To the plaintiffs as the Shareholder Members Protective Committee on account of the expenses paid or incurred prior to March 1, 1947 as set forth in Exhibit "B" in the sum of $15,530.29.

(2) To the firm of Westover & Smith, as attorneys representing the plaintiffs Shareholder Members Protective Committee on account of the expenses of this litigation, advanced or incurred by them prior to March 1, 1947 as set forth in Exhibit C in the sum of $1,534.77.

(3) To the firm of Westover & Smith, as general counsel representing the plaintiffs Shareholder Members Protective Committee, as in interim allowance in partial payment on account of fees for services rendered by them as general counsel prior to March 1, 1947, such sum as the court shall determine to be reasonable and just.

(4) To Daniel W. O'Donoghue, Jr., as associate resident counsel in Washington, D. C., representing the Plaintiffs Shareholder Members Protective Committee on account of the expense of this litigation advanced or incurred by him prior to March 1, 1947, as set forth in Exhibit "A" in the sum of $230.07.

(5) To Daniel W. O'Donoghue, Jr., as associate resident counsel in Washington, D. C., the Plaintiffs Shareholder Members Protective Committee as Interim Allowance as partial payment on account of fees for services rendered by him prior to March 1, 1947, such sum as the Court shall determine to be reasonable and just.

38 (6) And for such other and further relief as this Honorable Court deems meet and just in the premises.

WESTOVER & SMITH,
By Wyckoff Westover,
WYCKOFF WESTOVER,
Attorneys for the Plaintiffs.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Paul Mallonee, being first duly sworn, deposes and says:

That he is one of the plaintiffs-appellees in the above-entitled action and chairman of the Shareholder Members Protective Committee and that he is authorized to make this verification for and on behalf of the said Committee; that he has read the foregoing Motion for Interim Allowance of Expenses and Attorneys' Fees Incurred by Plaintiffs as Shareholder Members Protective Committee, Suing as Representatives of the Shareholder Members of the Long Beach Federal Savings and Loan Association and knows the contents thereof; that the same is true of his own

knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes them to be true.

Paul Mallonee.
PAUL MALLONEE.

Subscribed and sworn to before me this 5th day of March 1947.

[SEAL] (S) BERTHA E. CUMPTON,
Notary Public in and for said County and State.

My Commission Expires Dec. 26, 1949.

39 EXHIBIT A

In the District Court of the United States Southern District of California, Central Division

Civil File No. 5421 P N

PAUL MALLONEE, ET AL., PLAINTIFFS

vs.

JOHN H. FAHEY, ET AL., DEFENDANTS

Statement of legal services of Daniel W. O'Donoghue, Jr.

The undersigned Daniel W. O'Donoghue, Jr., retained and acting as the attorney in Washington, D. C., for Paul Mallonee, C. H. Newhouse, and Winnie Bucklin, plaintiffs herein and appellees in Fahey v. Mallonee, et al., Case No. 687 of the October Term 1946 in the Supreme Court of the United States, as and for a statement of legal services rendered to said appellees from September 30, 1946 to March 1, 1947, respectfully represents to the Court as follows:

1. Counsel is a member of the bar of the District Court of the United States for the District of Columbia, of the United States Circuit Court of Appeals for the District of Columbia and of the Supreme Court of the United States, and is actively engaged in practice in the District of Columbia, with offices in the Union Trust Building in the said city.

2. On September 30, 1946, counsel was notified by a long distance telephone call from California that his legal services were urgently and immediately required in the matter of resisting a possible application by the Department of Justice to the Supreme Court for a stay of the execution and enforcement of a decree and judgment of this court expected to be entered that day removing A. V. Ammann as conservator of the Long Beach Federal Savings

and Loan Association and returning the control and possession of the said association to its duly elected directors and officers. On the same day counsel received in the mail a massive file comprising copies of all the various pleadings, motions, orders, etc., filed in the above-entitled cause. At that time counsel advised the attorneys for the parties in California that in addition to the usual demands of a busy law practice he was then engaged in several time-consuming matters of great importance to him (one being concerning the attempt of certain New York interests to purchase control of the Union Trust Company in which counsel individually and on behalf of clients had long been interested and was both a director and stockholder and the other being his preparation for a hearing before the Auditor of the United States District Court on the accounts of trustees of the Cammack trusts—totaling over two million dollars—in which counsel was defending the trustees against various charges), and that hence was reluctant to accept a new assignment on such short notice. However, because of the urgency of the situation and the importance of the matter to the stockholders of the Long Beach Federal Savings and Loan Association, counsel, on the assurance that he would be adequately compensated, agreed to shelve pending matters and, at considerable sacrifice to himself, to take up immediately the representation of appellees in Washington for the purposes requested. It was understood by counsel that he was not retained to prepare the briefs or argue the appeal on the merits in the Supreme Court, but to act in behalf of appellees in the emergency matter of opposing any application to the Supreme Court by Messrs. Fahey and Ammann for a stay of the execution of the expected order of the three judge court returning the assets and affairs of the Long Beach Federal Savings and Loan Association to its directors, and subsequently to continue as Washington counsel for appellees, Mallonee, et al., in the appellate proceedings, to advise with California counsel on all matters of Supreme Court practice and procedure and to render such appropriate legal assistance requested of him as he might, by reason of his situation as Washington counsel, be enabled to give.

3. Counsel having accepted this assignment on the late afternoon of September 30, 1946, gave consideration that very evening to the problem of how best to arrange for immediate notice to himself of any application which the Department of Justice might make ex parte to a justice of the Supreme Court for a stay of the expected decree of the three judge court in California, and reviewed the various rules of the Supreme Court which might have any bearing on the matter including those relating to the right of a justice of the court to grant a stay in advance of the allowance of an appeal and the procedure thereupon. The first thing the

next morning counsel, cancelling another engagement, visited the Clerk's Office of the Supreme Court, and conferred with the Clerk and one of his assistants in this matter. Counsel formally advised the Clerk that he had been retained to represent the successful plaintiffs, Mallonee, et al. to resist any application to the Supreme Court that defendants Fahey and Ammann might make for a stay of execution of the decree of the three judge court in California. While counsel ascertained that nothing had up to that time been filed in behalf of Ammann and Fahey, counsel obtained the promise of the Clerk that he would be immediately advised by phone if any such application were filed in order that he might be enabled either to request a postponement of any hearing thereon or personally be heard in opposition thereto.

4. Upon returning to his office, counsel learned by telegram from California that the three judge court had signed the order returning the Long Beach Federal Savings and Loan Association to its directors forthwith and had denied the Government's mo-
42 tion to stay execution. Counsel commenced a hurried perusal of the more important papers in the voluminous file on this case until required to attend a critical board meeting of the executive committee of the board of directors of the Union Trust Company. He was called from this meeting by an urgent call from the assistant clerk of the Supreme Court advising that the acting Attorney General had filed an application for a stay and had requested Justice Rutledge of the Court to hear and act upon the application at 3 p. m. that very day. Counsel immediately called the acting Attorney General, explained plaintiff's desire to be heard on the application, his own lack of familiarity with the case and requested delay for a day or so until California counsel familiar with the case could arrive by plane to be heard. Mr. Douglas McGregor the acting Attorney General denied this request unless the successful plaintiffs below would stipulate to a stay by the lower court pending the requested hearing by a Supreme Court justice. Counsel then phoned California and was advised by attorney Charles Chapman in behalf of all the prospective appellees that the directors and officers of the Long Beach Federal Savings and Loan Association had already been placed in possession by the United States Marshall and that they would not enter into any such stipulation as requested. Counsel was briefed on the main points of case for the hearing before Justice Rutledge if it proved that same could not be postponed. Further conversations with Clerk's office and Mr. McGregor were unavailing to obtain postponement for even a day. Counsel then went over the principal pleadings in the file in a concentrated effort to prepare for the hearing in the single hour remaining; and, having broken all engagements for that afternoon, went to the Supreme Court

at 2:30 p. m. of October 1st to read hurriedly over the Government's application for a stay and the lengthy affidavit of Harold Lee attached before going in to the hearing before Justice Rutledge at 3 p. m.

5. The hearing before Justice Rutledge on the Government's application for stay lasted for more than two hours in all. It was broken by a long distance call by counsel to
43 California during an intermission allowed by Justice Rutledge for the purpose of determining whether the prospective appellees would agree to a temporary stay of the execution of the order of the lower court until a more adequate hearing could be held. This suggestion was made by Justice Rutledge after counsel had objected to the hearing being held on such short notice and had explained his lack of familiarity with the case. This proposition was rejected by California counsel on the basis that it would involve giving up a possession already obtained under the lower court's order. At the outset of the hearing counsel raised the issue of the power of a justice of the Supreme Court to grant a stay where no appeal had yet been allowed, citing the provisions of Rule 36 on this point. This jurisdictional point having finally been decided adversely to counsel, he proceeded to argue on the merits against the requested stay to the best of his ability on such limited preparation. At the conclusion of the hearing after Justice Rutledge had announced that with some hesitation he would nevertheless issue the requested order staying execution of the lower court's order, appellant requested and obtained Justice Rutledge's consent to grant a rehearing at a later date upon a motion to vacate the stay order to enable California counsel more familiar with all the facts and background of the case to be heard. Thereafter, counsel and Department of Justice attorneys consulted on the terms of the stay order submitted to Justice Rutledge. It was after 5:30 p. m. when counsel returned to his office and phoned California the result of the hearing.

6. On October 2, the following day, counsel read further into the file of the proceedings before the court in California, and had a preliminary phone conversation that evening with Raymond Tremaine, attorney for appellee Robert Wallis, who had just arrived by plane from Los Angeles for the purpose of assisting counsel in opposing the Government application for stay, by then already granted.

44 7. From October 3rd to October 5th inclusive counsel was almost continually engaged in conferences with Mr. Tremaine and in working with him on various phases of this case. While counsel did manage to keep a few engagements on other matters and gave some slight time to his local law practice, by far

the larger part of his time was devoted to serving the interests of his clients in California and taking advantage of the opportunity of getting the factual background of the case first-hand from Mr. Tremaine. Without detailing all the various items of legal services and advice rendered during this period, suffice it to say that in addition to the more or less continuous series of conferences which counsel and Mr. Tremaine had concerning this case, counsel either by himself or in conjunction with Mr. Tremaine, engaged in many long distance conferences with Messrs. Westover and Chapman in California obtaining for and reporting to them various items of information desired. For instance among many other requests from California were those for certain information on which to base a proposed demand for inventories to be addressed to and served upon the Federal Home Loan Administrator here in Washington and for verification of the service made in the District of Columbia on certain defendants below and obtaining certified copies of proper returns thereof. Questions of the manner in which, and persons on whom, service should be made were investigated and answered by counsel. Counsel in connection with his duties and at the request of Mr. Wyckoff Westover, chief counsel for appellees Mallonee, et al., made trips to the office of the Clerk of the Supreme Court to obtain certain photostat copies of papers in this case on file there and had conversations with the Solicitor's Office in the Department of Justice on certain aspects of the case. Counsel in collaboration with Mr. Tremaine drafted in tentative form the motion to vacate the stay order and revised the same. Counsel advised on the form of the said order and the procedure to be followed in its service, filing and the obtaining of a date for an oral hearing thereon. Counsel drafted the statement of the various grounds for the said motion to vacate adopted almost without change in the final form of the said motion as later filed. Mr. Tremaine and counsel considered the advisability of filing a memorandum of points of law in support of said motion and reviewed a number of Supreme Court cases which might be used in such a memorandum. The lengthy affidavit of Harold Lee on which the Government's application for the stay had been based was broken down and inconsistencies between some of the statements therein and the record were noted. After considerable thought and discussion both between Mr. Tremaine and counsel and between these two and the attorneys in California, it was decided not to file the motion to vacate or request the rehearing until numerous affidavits rebutting the erroneous inferences and conclusions of Harold Lee's affidavit and evidencing the irreparable injury resulting from the continuance in

possession of the conservator had been prepared and assembled in California.

8. From October 10th, the date of Mr. Tremaine's departure, to November 19th when Mr. Wyckoff Westover, Chief counsel for the appellees Mallonee et al., arrived in Washington, rarely did more than a day or two go by that counsel did not perform some legal service in this case. Counsel received frequent letters from Mr. Westover as well as a number of letters from Mr. Chapman and Mr. Tremaine. These letters were interspersed with long distance phone calls some of them very lengthy. Almost all these letters and phone calls required that counsel either give some advice, inquire into some matter, supply requested information or perform some item of service. Counsel drafted various letters in reply and throughout this period spent considerable time
46 in assiduously complying with these requests from California and rendering to counsel there his best advice on all the various and sundry matters in respect of which inquiry was made. Among other items which occupied counsel's attention during this period were the following: Service on the proper official of the Federal Home Loan Bank Administration of the demand for inventories, forwarded to him by Mr. Westover, conversations with Mr. Howard LeRoy in an effort to obtain an affidavit as to his legal services in behalf of Long Beach Federal Savings and Loan Association prior to its seizure by Mr. Fahey, and obtaining a date for the oral hearing by Justice Rutledge on appellees' motion to vacate stay order at the earliest possible date after service of motion. In order to obtain an advantageous date for the hearing when Mr. Westover could conveniently arrive to argue the same, it was necessary to make numerous calls not only to the Clerk's Office to consult the convenience of Justice Rutledge, but to the Solicitor General's office and to Mr. Raymond Dougherty of the Federal Home Loan Bank Administration, and then to report back by phone to California. Counsel's associate attended to the service of copies of the motion to vacate, notice of motion, supporting points and authorities, and affidavits in support of motion on the Solicitor General and the filing of the originals of these documents with the Clerk of the Supreme Court. In this connection, counsel had previously advised with the attorneys for appellees in California as to the advisability of filing nine copies of the same in the Clerk's office with the thought that this would make consideration of the same available to the full court on the chance that Justice Rutledge might refer the decision of the motion to the full court in conference. During this period after Mr. Tremaine's departure, counsel also undertook to read through the more essential parts of the voluminous file of the proceedings before the three judge court and the hearings before the

report of the special Congressional Committee upon the seizure of the Los Angeles Home Loan Bank and the Long Beach Federal Savings and Loan Association.

9. On November 19th Mr. Wyckoff Westover arrived from California for the purpose of arguing the motion to vacate the stay order at the rehearing which counsel had finally succeeded in arranging for 2 p. m., November 23, 1946. From the date of his arrival, Mr. Westover and counsel were more or less constantly in conference in preparing for the said hearing. Counsel had previously read and carefully considered the various affidavits and points and authorities filed in support of the motion to vacate, and had made notations on the points which he considered effective to make in oral argument. He went over these in great detail with Mr. Westover and in turn examined and considered a tentative outline of oral argument prepared by Mr. Westover.

10. On or about November 22nd counsel was served with reply memorandum of appellants to which were attached in opposition to dissolution of the stay order 19 affidavits many of which were of considerable length. Mr. Westover and counsel immediately devoted all their time to reading through and digesting this mass of factual allegations. Long distance calls to California ensued to request additional facts in affidavit form to rebut and explain various incorrect or misleading statements and inferences contained in appellant's affidavits. Mr. Westover and counsel in the next two days before the hearing devoted almost all their available time to last minute preparations for the oral argument and to revising and putting in final form an elaborate outline and notes for the same. During this period from November 19th to the hearing, Mr. Westover and counsel were not only in very frequent conference during the daytime on this case but also spent two evenings working in preparation of the same.

11. Counsel was in attendance at the hearing held before Justice Rutledge in chambers on appellees' motion to vacate the
48 previous stay order. Mr. Westover assumed the burden of argument for appellees and made a masterly presentation of appellees' case, with counsel serving only to open the argument and introduce Mr. Westover to the Court and to make several suggestions in the course thereof. The hearing lasted until 4:30 p. m., after which Mr. Westover and counsel had a long final conference in re the filing of rebuttal affidavits, the scope thereof, and the counterdesignation of the printed record, such conference lasting until Mr. Westover's departure for California about 7 p. m.

12. Subsequent to Mr. Westover's departure, counsel was in touch with the Clerk's office of the Supreme Court regarding the time within which the proposed rebuttal affidavits could be filed, and sent to and received from Mr. Westover, a number of tele-

grams in regard to such affidavits in order that the deadline for their consideration by Justice Rutledge before date for next judicial conference might be met. On December 5, 1946, just before the deadline, and after various calls to the airport, the appellees' memorandum in rebuttal with the said affidavits attached was received, certain typographical corrections were made and the memorandum and affidavits were then served on the Solicitor General, and promptly filed with the Clerk. Counsel also served upon Solicitor General and filed appellees' counterdesignation of printed record. Later, after filing, counsel read more fully and considered the voluminous rebuttal affidavits.

13. On or about December 9th, 1946, copy of the order of the Supreme Court, dated December 9th, 1946, noting probable jurisdiction and denying appellees' motion to vacate the stay order of October 1, 1946, was obtained and mailed immediately to California. Since that date counsel has rendered legal advice from time to time as requested by California counsel, has kept in touch with the Clerk's office to follow the position of this case on the Supreme Court's calendar and has advised Mr. Westover
49 thereof. On January 8, 1947, Mr. Stern of the Solicitor General's office called counsel to advise of the Government's objection to appellees' counterdesignation of printed record, contending much material designated therein was unnecessary to any issue on appeal. Counsel advised that he was not authorized to negotiate on such matter and suggested that the particular pages or parts objected to be specified and the ground of objection stated in a letter to the various California counsel. Later the letter of George T. Washington, acting Solicitor General, dated January 9, 1947, in seven copies addressed to all the various counsel in case requesting reduction of the printed record was received and forwarded by the counsel to addressee. Later counsel by phone rendered advice as to procedure under Rule 13 paragraph 9 of Supreme Court and discussed the requests of the Solicitor General's said letter. After receiving eight copies of stipulation regarding diminution of printed record drafted and executed by attorneys in California, counsel got in touch with Mr. Robert Wallis, a party to this cause who was here in Washington on another matter, and obtained his signature to the stipulation. At request of the California attorneys and after consultation with Mr. Wallis, counsel drafted an enclosing letter, dated February 10, 1947, to the acting Solicitor General and left the same with the stipulation at the office of the Solicitor General. Thereafter counsel received a call from Mr. Stern of the Solicitor's office rejecting the stipulation as drawn which he duly reported to Mr. Westover and later advised Mr. Stern that he should take up the matter of possible diminution of the printed record directly with California counsel.

14. Counsel also spent some time in conference with California counsel, both in Washington, D. C., and by long distance telephone, considering with them how the case would shape up on oral argument, the necessity for being prepared for questions on
50 side issues and the difficulty of developing the facts and main issues of a case like this in the limited time allowed, especially in view of probable interruptions.

15. The above brings counsel's services down to March 1, 1947. Counsel estimates that he has spent well over one hundred sixty-five hours of time in rendering legal advice and services in this case. In addition about twenty-five hours were expended by an attorney in counsel's office in assisting him in the execution of his duties as Washington Counsel for appellees' Mallonee et al. The total figure of time spent on this case of close to two hundred hours does not include any secretarial time of which a substantial amount was required and for which no separate allowance is asked. There is attached hereto and made part hereof a statement of costs paid and advanced in the total amount of $230.07 by counsel in this case for which no reimbursement has yet been received.

16. In view of the character of the legal advice and services required of counsel, the priority which counsel was obliged to give and did give this case over other pending matters at considerable sacrifice to himself, the importance of the subject matter and issues involved, and the responsibility involved in continually advising on matters of Supreme Court practice and procedure, counsel is of the opinion that a substantial interim allowance should be determined and allowed by this Honorable Court as reasonable compensation for his services to date, and respectfully requests this Honorable Court to pass an order allowing him such compensation at this time.

(S) Daniel W. O'Donoghue, Jr.,
DANIEL W. O'DONOGHUE, JR.,
Attorney for Paul Mallonee, C. H. Newhouse and Winnie Bucklin, appellee,
Union Trust Building, Washington 5, D. C.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me a notary public in and
51 for the District of Columbia the undersigned Daniel W. O'Donoghue, Jr., who being duly sworn, deposes and says that the facts and matters stated in the within statement he verily believes to be true.

(S) DANIEL W. O'DONOGHUE, Jr.

Sworn and subscribed before me this 4th day of March 1947.

(S) JOSEPH STEIN,
Notary Public, D. C.

52 *Statement of costs paid and advanced in matter of Fahey v. Mallonee, et al., Supreme Court 657*

Paid to Clerk, U. S. Supreme Court for certifying and photostat charges for copy of application to stay and order granting same	$13.00
Telephone and telegraph charges:	
1946	
9/ Long Beach	8.90
9/12 Long Beach, tgm	1.39
9/4 Long Beach, tgm	1.61
9/20 Long Beach, tgm	2.35
10/1 Long Beach	11.50
10/3 Long Beach	14.30
10/4 Long Beach	20.30
10/7 Long Beach	8.90
10/17 Los Angeles	16.90
11/5 Los Angeles	23.90
11/6 Los Angeles, tgm	6.47
11/7 Long Beach, tgm	7.70
11/14 Los Angeles, tgm	4.88
11/7 Long Beach, tgm	2.82
11/11 Los Angeles, tgm	2.91
11/15 Long Beach	11.90
11/21 Long Beach, tgm	1.79
11/25 Long Beach	15.50
12/1 Los Angeles, tgm	4.32
12/4 Los Angeles, tgm	1.69
12/9 Long Beach	3.50
	$186.66
Plus 25% tax on all telephone and telegraph charges	43.41
Total	230.07

I certify that the above costs in this matter were paid by me.

(S) Daniel W. O'Donoghue, Jr.
DANIEL W. O'DONOGHUE, JR.

53 EXHIBIT B

Stationery, Supplies, Binders and Photostats	$1,500.04
Printing (Proxies)	211.12
Advertising (Newspaper)	216.22
Postage and Express	212.78
Telegrams	55.82
Airline Ticket (1 way between Los Angeles & Wash., D. C.)	128.05
Stenographic work (Incl. proofreaders) 15 people-total (10,044 hours)	12,822.50
Mileage allowances (6,396 miles total @ .06 per mile)	383.76
	15,530.29

Statement of expenses of the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association in connection with the litigation of said committee for and on behalf of all the shareholder members of said association v. John H. Fahey, A. V. Ammann et al., being Number 5421–P. H. in the District Court of the United States, in and for the Southern District of California, Central Division and appeals therefrom up to March 1, 1947.

54 EXHIBIT C

Expenses incurred by Westover & Smith for Plaintiffs in the Matter of Paul L. Mallonee et al. v. John H. Fahey et al.—United States District Court—File No. 5421 P. N.:

Fees to Clerk for Filing, Certification of Documents, etc	$110.65
Premiums on various Bonds for Restraining Orders, etc	100.00
Fees to United States Marshal at Los Angeles for serving of various documents	79.96
Fees to United States Marshal for serving John H. Fahey—Washington, D. C	4.00
Fees to Corporation Commissioner of the State of California for Permit for Shareholder Members Protective Committee and renewal thereof, etc	50.00
Cost of Photostatic copies of various documents, records, etc	21.12
Cost for reproduction of various documents where needed in excessive volume and excessive speed in excess of the normal office typing to Deposition Bureaus, Public Stenographers, etc	589.14
Notary fees incurred for the verification of various documents, etc	19.00
Telephone calls and telegrams	122.32
Registered mail, etc	10.01
Hotel expenses in Washington, D. C., and while away from Los Angeles	99.70
Meals in Washington, D. C., and while away from home office	126.90
Transportation Expenses including Airplane Ticket from Washington, D. C., taxi cab fares, etc	201.97
Total	1,534.77

I certify that the above listed expenses were disbursed by us in this matter.

WESTOVER & SMITH.
By WYCKOFF WESTOVER.

55 WESTOVER & SMITH
1007–1015 Pacific Southwest Bldg.
215 West Sixth Street
LOS ANGELES 14, CALIFORNIA
Phone Trinity 8791

In the District Court of the United States in and for the Southern District of California, Central Division

Civil File No. 5421 P. M.

Affidavit of Paul Mallonee in support of motion for interim allowance of expenses and attorneys' fees incurred by plaintiffs as Shareholder Members Protective Committee, suing as representatives of the Shareholder Members of the Long Beach Federal Savings and Loan Association

PAUL MALLONEE, C. H. NEWHOUSE AND WINNIE BUCKLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR AND ON BEHALF OF ALL OF THE SHAREHOLDER MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, AN ASSOCIATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES OF AMERICA, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY AND A. V. AMMANN, AS THE PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, SUED HEREIN AS JOHN DOE ONE (CROSS-CLAIMANT IN INTERPLEADER), R. H. WALLIS, SUED HEREIN AS JOHN DOE TWO (CROSS-CLAIMANT IN INTERPLEADER), ET AL., DEFENDANTS

56 "SUB NOMINAE"

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK ET AL., THIRD PARTY DEFENDANTS

ROBERT R. WALLIS, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY ET AL., THIRD PARTY DEFENDANTS

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY ET AL., THIRD PARTY DEFENDANTS

FEDERAL HOME LOAN BANK OF LOS ANGELES, ETC., THIRD PARTY DEFENDANT AND CROSS-COMPLAINANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES KNOWN AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL., THIRD PARTY CROSS-DEFENDANT

57 STATE OF CALIFORNIA,
County of Los Angeles, ss:

Paul Mallonee, being first duly sworn deposes and says:

That he is one of the plaintiffs and appellees in the above-entitled action, and is Chairman of the Shareholder Members Protective Committee; that as Chairman of the Shareholder Members Protective Committee he has had the supervision of the management of the Shareholder Members Protective Committee activities;

That the Shareholder Members Protective Committee retained the fi m of Westover & Smith to set as their general counsel in the above-entitled action; that the members of the said firm, Wyckoff Westover and Steadman G. Smith are members of the Bar of the State of California, and are admitted to practice law before all the Courts of the State of California, and are admitted to practice law in the District Court of the United States, in and for the Southern District of California, Central Division; and that Wyckoff Westover, a member of said firm is also admitted to practice before the Supreme Court of the United States of America;

That your affiant has read and is familiar with the foregoing "Motion for Interim Allowance of Expenses and Attorneys' Fees Incurred by the Plaintiffs, as the Shareholder Members Protective Committee, suing as Representatives of the Shareholder Members of the Long Beach Federal Savings and Loan Association," and represents to this Honorable Court that the contents insofar as is known to your affiant are true and that your affiant is informed and believes that all representations in said motion are true; that the major portion of the work in the above-entitled litigation for, and on behalf of, the plaintiffs has been performed either by Wyckoff Westover, personally of the firm of Westover &
58 Smith, or by other attorneys working with, and under his supervision and direction and that a substantial amount of legal work and services have been rendered for, and on behalf of, the plaintiffs, the Shareholder Members Protective Committee by Mr. Daniel O'Donoghue, Jr., a member of the Bar and entitled to practice in all of the Courts in Washington, District of Columbia, including being a member of, and entitled to practice before the Supreme Court of the United States of America; that during and since the formation of the Shareholder Members Protective Committee, your affiant has had frequent and numerous consultations with the members of said Comittee;

That the said committee has maintained offices, had an office manager, has incurred expenses and liability for managerial, secre-

tarial, and stenographic help, has incurred expenses for stationery, printing, postage, telephone, general office overhead as is normally incident to the maintaining of offices doing a great deal of preparation of legal documents, affidavits, and copying legal documents, points and authorities, affidavits, statements, motions, and records of court; that the said Committee has printed authorizations and proxies from shareholder members of the signed authorizations and proxies from shareholder members of the Long Beach Federal Savings and Loan Association, has endeavored to keep the members of the said association advised of the progress of this litigation, has actively cooperated with Westover and Smith, the attorneys for the said Shareholder Members Protective Committee and has aided and assisted their efforts and other counsel whose interests and objectives were similar to, and not in conflict with, the interest of the shareholder members of the Long Beach Federal Savings and Loan Association. That the said committee has expended considerable sums of money and incurred extensive liabilities and obligations for the copying of the court record, consisting of approximately 1,500 legal size pages to aid in expeditiously furnishing to the Supreme Court of the United States
59 ten copies of such record for their use, as well as furnishing copies of said record to counsel for all other parties in said litigation to aid the court in the hearing and determination of preliminary motions on appeal prior to the printing of the record on appeal, the expense of typing of which record, though considerable, was far less and more expeditious than would have been the printing of said record; that all of said activities of said Shareholder Members Committee and all of the expenses incurred by said committee have been for the mutual protection of all the shareholder members of the Long Beach Federal Savings and Loan Association; that there is attached hereto and made a part hereof, a detailed summary of the expenses paid or incurred by said Shareholder Members Protective Committee prior to March 1, 1947 as set forth in Exhibit A, B, and C attached hereto; that your affiant believes that the amounts shown on said statements are reasonable and to the best of his knowledge and belief correctly reflect the reasonable value of the services rendered for said Committee and the expenses incurred by said Committee for the mutual benefit of all of the shareholder members of the said association, that for himself and on behalf of the other members of the Shareholder Members Protective Committee your affiant reports that the three members of said Shareholder Members Protective Committee are not seeking, nor have they received, any

remuneration for their personal services rendered as members of the Shareholder Members Protective Committee.

(S) Paul Mallonee.
PAUL MALLONEE.

Subscribed and sworn to before me this 5th day of March 1947.
[SEAL] (S) BERTHA E. CUMPTON,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Dec. 26, 1949.

60

WESTOVER & SMITH
1007–1015 Pacific Southwest Bldg.
215 West Sixth Street
LOS ANGELES 14, CALIFORNIA
Phone Trinity 8791

In the District Court of the United States, Southern District of California, Central Division

No. 5421–PM

PAUL MALLONEE, ET AL., PLAINTIFFS
vs.
JOHN H. FAHEY, ETC., ET AL., DEFENDANTS

Points and authorities in support of motion for allowance of fees and expenses

I

GENERAL PRINCIPLE

It is proper for a court exercising equitable jurisdiction to make an allowance of a reasonable fee out of the fund or property created or preserved, for an attorney representing a party, who, at his own expense, has maintained a suit for the recovery, preservation, protection, or increase of a common fund or common property, or has created or brought into court a fund in which others are entitled to share. 107 A. L. R. 750 et seq.

II

LEADING CASE

The leading case on this subject is Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157.

61 That case was an action by a bondholder of a railroad company on behalf of himself and the other bondholders against the trustees of an improvement fund and against the board as a corporation (Page 528). Trustees were charged with wasting and destroying the trust fund and that fraudulent conveyances be set aside (Page 528–9).

As a result of plaintiff's action a large amount of the trust fund was saved, the management taken out of the hands of the trustees and considerable amount of money was realized (Page 529). The plaintiff paid most of the expenses of the litigation (Page 529). He petitioned for an allowance out of the trust fund for his expenses and services (Page 529).

A master allowed him $19,745.68 for his expenses including expenses of attorneys and agents to investigate fraudulent grants of trust funds, for his personal services $25,000 principal and $9,625 interest and a personal expense account of $15,003.35 total $40,003.35 (Page 530), plus interest.

The trial court (Dist.) confirmed it to the extent of $27,835.34 (Page 53). The Circuit Court of Appeals allowed him $60,131.96.

The Supreme Court held (Page 532) "it would give to the other parties entitled to participate in the benefits of the trust an unfair advantage" were plaintiff required to pay all the expenses and each should contribute a due proportion of the expenses he has fairly incurred (Page 532). "To make them a charge upon the fund is the most equitable way of securing such contribution" (Page 532).

"It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts" (Pages 532–3).

62 Cowdrey v. Galveston R. R. Co., 93 U. S. 352, was cited as a case wherein counsel fees of bondholders were ordered paid by a receiver out of receivership funds (Page 536). In affirming the judgment allowing counsel fees the court stated (Page 537):

"The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have."

The allowance was made before the litigation was concluded (Page 538).

The above-mentioned case has been cited as authority so many times no effort is here made to list the cases in which Trustees v. Greenough (supra) has ben cited.

III

Greenough Doctrine Expanded

The above stated doctrines were enlarged upon in the case of Sprague v. Ticonic National Bank. (1939) 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184.

This was a suit in equity to establish a claim for priority and a lien on securities of defendant bank. Plaintiff pending determination of the Supreme Court on certiorari petitioned the District Court for an allowance of counsel fees and disbursements over and above statutory costs. The District Court dismissed the petition and the Circuit Court of Appeals, 1st Circuit affirmed.

An appeal was taken to the Supreme Court. The opinion was written by Justice Frankfurter citing, Trustees v. Greenough with approval (Page 781). No dissent. Reversed and the District Court directed to entertain the petition to allow fees and expenses out of the common fund. Court stated it was not necessary to sue for a class to obtain reimbursement (Page 780).

This case has also been cited as authority many times.

An able dissertation upon the effect of the decision in
63 Sprague v. Ticonic National Bank (supra) is contained in the opinion of the court in Boise v. Boise, 56 Fed. Supp. 339 (1944 D. C. N. J.) in which the case of Trustees v. Greenough was cited and the statement made (Page 340) that "this rule has been extended by the opinion in Sprague v. Ticonic National Bank, supra (307 U. S. 161, 59 Sup. Ct. 780, 83 L. Ed. 1184) to permit an allowance in view of * * * stare decisis; where the action of one litigant, instituted solely for himself, redounded to the benefit of fourteen others, it appearing that the court had control of the funds involved. There each of the claimants, though not parties to the litigation had their funds depleted by the allowance of a fee to the attorney of the one who litigated."

This equitable method of apportioning the expense of litigation among the parties being benefited was approved.

IV

Case of Winslow v. Ferguson

In the recent case of Winslow v. Ferguson (1944) 25 Cal. (2d) 274, the principles of Trustees v. Greenough and Sprague v.

Ticonic National Bank (supra), were applied in an equity receivership action where the facts as to the pertinent points were very similar to the facts in the case at bar.

The court there states (Page 284):

"The order of August 11, 1941, directing that attorney fees and costs be paid out of the trust fund preserved through the diligence of counsel for all persons interested therein, finds support in a long prevailing rule in equity which allows such charge as a proper means of securing contribution from those entitled to participate in the benefits of the litigation. (9) And such counsel fees are customarily made senior to other claims against the fund. (Scott v. Superior Court, 208 Cal. 303 (281 Pac. 55) and at page 284 stated:

"Where a lawyer has rendered such valuable service as to 64 make available a fund for a class, even though he appeared for only one claimant, it is equitable that his compensation and expenses should come from the entire fund saved for all classes concerned before it is distributed. (Sprague v. Ticonic National Bank, 307 U. S. 161 (59 S. Ct. 777, 83 L. Ed. 1184).) Counsel's right to compensation under such circumstances arises from the benefit conferred upon those who would have suffered loss but for his timely intervention, and not by reason of an agreement to pay his fees. (Nuford v. Tobacco Growers' Co-op. Assn., 42 Fed. 2d. 791.)

V

Doctrine Expanded in California

The receivership of the Pacific States Savings and Loan Company was the subject of considerable litigation. In two opinions in the actions entitled Eggert v. Pacific States Savings & Loan Company, attorney fees and costs were allowed (a) to the plaintiffs in a representative capacity 20 Cal. (2d) 199, and (b) to the directors and their attorneys 53 Cal. App. (2d) 552.

VI

Additional Cases

Additional support for these general principles above stated 8 Cyc. Fed. Proc. (2d) Ed. Sec. 3665, page 485 as follows:

"In addition to the counsel fees allowed by statute, if the attorney's services have caused the recovery or preservation of a fund, it has been held as a matter of equitable principle that the fund may be charged with the costs of those services."

See also: O'Hara v. Oakland County, 136 Fed. 2d 132, 154 (1943);

In re Chicago M. St. P. & P. R. Co. v. Scandrett, 138 Fed. 2d 433, 436, certiorari denied 321 U. S. 770, 88 L. Ed. 1066, 64 Sup. Ct. 528.

65 Buell v. Kanawha Lumber Corp., 201, Fed. 762.

Carbon Steel Co. v. Slayback, 31 Fed. 2d, 702.

Lamar v. Hall, 129 Fed. 79.

Editor's Comment: 49 A L R 1190, 141 AM. Jur. 47.

New York Life Ins. Co. v. Miller, 139 Fed. 2d 657.

Prudential Ins. Co. v. Tomas, 45 Fed. Supp. 353.

VII

The final result of the litigation is not the determining factor.

(a) Fees were allowed the attorney of a dissenting shareholder although the court approved the plan.

In re Thomas de la Rue & Co., Ltd. (1911) 2 Ch. 361.

(b) Fees of a special master and his accountant were assessed equally to both the successful and defeated parties in Wymans v. Associated Almond Growers, U. S. District Court, Southern District of California No. E99-M.

(c) Plaintiff was allowed costs after her bill was dismissed. The Circuit Court of Appeals upheld this order.

Ruby Lee Minar, Inc. v. Hassett, 53 Fed. (2d) 1011.

(d) In Kansas City M. H. Co. v. Guardian Trust Co., 280 U. S. 1, 9, 74 L. Ed. 659, 667 the court stated as follows:

"In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to facts and circumstances of the case."

Cowdry v. Galveston, 93 U. S. 352, which case was not to trial but a receiver was ordered to pay plaintiff's attorney's fee. To similar effect:

Central Trust Co. of N. Y. v. D. S. L. & W. Co. (C. C. A. 3), 233 Fed. 420, 421.

Canter v. The American and Ocean Insurance Companies,

66 3 Peters 307, 319, 7 L. Ed. 690, 695.

Colley v. Wolcott, 187 Fed. 385, 387 (C. C. A. 9-1911), where fees were ordered paid more than six months before final decree entered.

Equitable Trust Co. v. Western Pacific R. Co., 230 Fed. 403 (D. C. Cal. 1916), where payment was made to counsel for certain intervenors.

Harrison vs. Perea, 168 U. S. 311, 325 and 326; 18 Sup. Ct. 129, 42 L. Ed. 478 (Probate estate). There was a recovery of payments which had been wrongfully made by an administrator, yet administrator was allowed a portion of his fees.

VIII

Payment may be ordered and made prior to conclusion of litigation.

Expenses to plaintiffs and fees to plaintiff's attorney were ordered paid both before (1) interlocutory judgment and (2) after interlocutory judgment and before final judgment in Winslow v. Ferguson, supra.

Similarly, the attorney for certain remaindermen was allowed fees, notwithstanding he had been compensated for his services by his own client. Wallace v. Fiske, 80 Fed. 2d. 897. In Warren v. Palmer, 310 U. S. 132; 84 L. Ed. 1118, 1123, 60 S. Ct. 865, the Court stated:

"Courts having custody of property or a fund have the power to require that expenses which have contributed either to the preservation or creation of the fund in its custody shall be paid before a general disposition among those entitled to receive it."

Also see: Trustees v. Greenough, supra;

Sprague v. Ticonic National Bank, supra;

Winslow v. Ferguson, Supra;

67 8 Cyc. Fed. Proc. 2d. Ed. 490 Sec. 3666.

Detective Comics, Inc. v. Bruns Publications, Inc., 28 Fed. Supp. 399, 902.

107 A. L. R. 726, 735 & 743.

IX

The allowance of attorney fees may be made directly to the attorneys themselves.

107 A. L. R. 750, 751.

99 A. L. R. 1155–6.

8 Cyc. Fed. Proc. 2d Ed. Sec. 3665, page 487.

14 Am. Jur. 48 Costs, Sec. 74.

Welte v. Hudson Nav. Co., 47 Fed. (2d) 166 (C. C. A. (2)–1931).

Central Railroad v. Settus, 113 U. S. 116 at 124–5. 28 L. Ed. 915, where attorneys had been paid by original clients and were ordered paid balance by others pro rata.

In the Matter of Richfield Oil Company of California, debtor, U. S. District Southern District of California, Central Division No. 28700–J.

Winslow v. Ferguson (1944), 25 Cal. (2d) 274, 153 Pac. (2d) 714.

In re Middle West Utilities Co., 17 Fed. Supp. 359, 367.

Colley v. Wolcott (1911), 109 C. C. A. 425, 187 Fed. 595.

X

Court May Act on Own Knowledge

The Court has authority to allow fees without motion or proof when it has personal knowledge of the case and the services rendered. Colley v. Wolcott, 187 Fed. 595, 597.

The "trial court could proceed upon its own knowledge of the value of the solicitor's services."

Harrison v. Perea, 168 U. S. 311, 325; 18 Sup. Ct. 129; 42 L. Ed. 478.

68 ### Conclusion

The moving parties, having incurred considerable expense for the preservation of a common fund for the benefit of all the shareholder members of the defendant association and being faced with further expense because of an appeal from the interlocutory judgment rendered herein, are entitled and this court of equity has authority to allow a reimbursement of expenses incurred by plaintiffs including direct payment of fees to their attorneys herein.

Respectfully submitted.

Westover & Smith,
By (S) Wyckoff Westover,
Wyckoff Westover,
Attorneys for Plaintiffs.

69 THOMAS AND WALLACE
Attorneys for Title Service Company
609 Jergins Trust Building
LONG BEACH 2, CALIFORNIA
Telephone 727-61

In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421-PH

Motion for allowance upon account of attorneys' fees and expense, and payment thereof, by Title Service Company

PAUL MALLONEE, C. H. NEWHOUSE, AND WINNIE BUCKLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR, AND ON BEHALF OF, ALL THE MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT

70 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

W. W. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

"SUB NOMINAE"

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANT

vs.

JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, FEDERAL HOME LOAN BANK OF PORTLAND, AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ALL ORGANIZATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES, THIRD PARTY DEFENDANTS

71 FEDERAL HOME LOAN BANK OF LOS ANGELES, A BODY CORPORATE, THIRD PARTY DEFENDANT AND CROSS-CLAIMANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES KNOWN AND REFERRED TO AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, A BODY CORPORATE, JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, AND PURPORTEDLY SERVING AS FEDERAL HOME LOAN BANK COMMISSIONER, CROSS-DEFENDANTS

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

NOTE.—There were 9 or more other Intervenors not herein named

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

ROBERT H. WALLIS, THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

72 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

To the Honorable PEIRSON M. HALL, *Judge of the United States District Court, Southern District of California, Central Division:*

Comes now Title Service Company, a defendant and Cross-Claimant in interpleader in the above entitled and numbered ac-

tion, and moves this Honorable Court for an interim order making an allowance to this defendant and cross-claimant upon account of its attorneys' fees and expense incurred herein, fixing and determining the amounts thereof, and ordering and directing payment thereof from funds held in the Registry of this Court. This motion covers work done by the attorneys for Title Service Company and expense incurred by it to and including the 25th day of February 1947, as more particularly hereinafter set forth.

This Honorable Court is respectfully requested to fix a time and place for the hearing of this motion and to prescribe, by order, the necessary notice to be given of such hearing and directing the manner of giving of such notice.

This motion is made and based upon all of the records and files in the above entitled and numbered matter, upon this formal motion, upon the affidavit of S. I. Bacon, the duly qualified and acting Vice President of Title Service Company, the Memorandum of Points and Authorities being filed concurrently herewith, and upon the following allegations of fact:

73 That Title Service Company is a corporation, duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in Los Angeles County, California. That the business of Title Service Company is the handling of escrows, acting as trustee under deeds of trust and sundry other functions having to do with real estate transactions. That it maintains offices for the transaction of such business in Long Beach and Bellflower, California. That on and prior to the 20th day of May 1946, it was named as the trustee under approximately 8,000 deeds of trust having an approximate value of $12,000,000, all upon real property located in Southern California, the bulk of which is in Los Angeles County; that various persons, firms and corporations were the makers of such deeds of trust and that the Long Beach Federal Savings and Loan Association was the beneficiary under all of said deeds of trust. That said deeds of trust had been given to secure the payment of promissory notes evidencing loans which had theretofore been made by the said Long Beach Federal Savings and Loan Association, that all of the makers of said deeds of trust are residents of Southern California, and most of them are residents of Los Angeles County.

That on the 20th day of May 1946, the defendants, John H. Fahey and A. V. Ammann seized the assets and assumed to take over the management of the Long Beach Federal Savings and Loan Association, hereinafter referred to as the "Association." That the defendant, Ammann claimed to have been acting as the Conservator for said Association under and by virtue of an order

of the Federal Home Loan Bank Administration of which the defendant Fahey was the Commissioner.

That shortly after the seizure of said Association the plaintiffs, acting for and on behalf of the depositors in said Associa-
74 tion, as representative of a class, did commence the above entitled and numbered action in this Court and did file their Bill of Complaint in equity, wherein it was sought to oust the defendants, Fahey and Ammann, and obtain the return of the assets and management of said Association to its duly elected officers and directors, said ouster being sought upon the grounds that the statute under which said seizure had been made, and the regulations adopted under which the appointment of a conservator was authorized, were unconstitutional and that said seizure was, therefore, void and of no effect. That in said Bill of Complaint a number of "John Doe" defendants were named, and that Title Service Company was later served as "John Doe I" and brought before this Court by appropriate process.

II

That shortly after the commencement of this action, and on or about the 31st day of May 1946, the defendant, A. V. Ammann, claiming to be acting as the Conservator for the Association, did deliver unto Title Service Company 174 promissory notes and deeds of trust executed by Home Investment Company, a California corporation, in favor of said Association as payee and beneficiary, in which trust deeds Title Service Company was named as the trustee, together with 174 Requests for Reconveyances referring to said deeds of trust, executed by himself, and did demand that Title Service Company, as trustee, make, execute and deliver unto him Reconveyance Deeds to the real property covered by said deeds of trust. That at about the same time said Association did notify Title Service Company that it did not recognize the authority of said A. V. Ammann to do any act or make or execute any document on behalf of said Association and did formally advise Title Service Company not to act upon the instructions of the said A. V. Ammann, and, further, that if it did act upon such instructions that Title Service Company would be held liable to said Association for any damages suffered as a consequence thereof.

75 That concurrently with the receipt of such advice from said Association, Title Service Company was served with an alias summons issued out of the above-named Court, making Title Service Company a Defendant in said action as "John Doe I".

That by reason of the allegations of the complaint served upon it by the plaintiffs it appeared that the purported appointment of the defendant Ammann, as conservator for the Association, was probably void and that the regulations under which he had purportedly been appointed and the statute under which said regulations had been adopted was unconstitutional. That upon consulting counsel, H. W. Wallace of the firm of Thomas and Wallace, an opinion was obtained confirming this belief in the unconstitutionality of said statute and the invalidity of such appointment.

III

That in order to relieve itself of liability by reason of the conflicting demands made upon it, as aforesaid, and as a party to the instant action, Title Service Company did retain and employ the law firm of Thomas and Wallace, duly licensed and practicing attorneys-at-law, members of the bar of the Supreme Court of California, the Bar of this Court, and of which firm Harry O. Wallace is a member of the bar of the Supreme Court of the United States. That upon the advice of said attorneys an Answer was filed in said action by Title Service Company, and that in conjunction therewith there was also filed by Title Service Company its Cross-Claim in Interpleader and in the Nature of Interpleader. That contemporaneously with such filing Title Service Company did deposit in the Registry of this Court, all of the 174 promissory notes, deeds of trust and requests for reconveyances hereinabove referred to. That by reason of the fact that the balance of the approximately 8,000 deeds of trust wherein
76 Title Service Company was named as trustee and said Association was named as beneficiary were in the hands of the defendant, A. V. Ammann, Title Service Company was unable to deposit the same in Court; but said cross-claim placed before the Court the question of the disposition to be made of the legal title to the remaining deeds of trust, approximating 8,000, in which legal title was vested in Title Service Company, as trustee, under which instructions of said Court, Title Service Company has made such reconveyances as have been made.

IV

That following the deposit of the 174 promissory notes, deeds of trust and requests for reconveyances, as above set forth, the Home Investment Company of Long Beach, a Corporation, the maker of said notes and deeds of trust, in order to clear the titles to said properties and obtain marketable titles thereto, filed its Petition in Intervention in the action and pressed the same to

hearing. That it was necessary for the attorneys for Title Service Company, to, and they did, prepare and file appropriate appearances in said intervention proceeding and, in conference with the attorneys for said Home Investment Company, the plaintiffs and the association, work out a procedure for the deposit of the money owned by the Home Investment in the Registry of this Court and for the delivery of reconveyances and the obtaining of policies of title insurance upon said real property.

V

That as the litigation progressed it was deemed necessary, and to carry out the duties imposed upon the trustee in said deeds of trust to protect the title to the property which was the subject matter thereof, to protect the trustors and the beneficiary, assignees, and those who had assumed from original trustors, for various reasons including purported assignments, transfer, pledges,
77 and other disposition thereof of said deeds of trust by the defendant Ammann, whose acts were questionable business practices, even had his appointment as conservator and his assumption to deal with such trust deeds been valid or done under a constitutional statue or law regulations, all of which were then being challenged and which have since been judicially ascertained to have been wrongful, to take affirmative action to place all persons on notice of the possible effect of such acts on the title to the properties under said deeds of trust. That it was deemed necessary, in order to prevent additional clouding of titles to the real property which was the subject matter of all of said trust deeds to prepare and record a Notice of Pendency of Action. That such Notice of Pendency of Action was prepared and recorded by the attorneys for Title Service Company, said recording being in the office of the County Recorder of Los Angeles County and referring to so many of the parcels of real property affected by said deeds of trust as were known to Title Service Company.

VI

That on or about the 5th day of June 1946, the Federal Home Loan Bank Administration issued its Order No. 5309 which purported to call an "Administrative Hearing" to be held before one of its own employees, for the purpose of determining whether or not a purported Conservator had been properly appointed by the defendant Fahey. That according to said order the so-called hearing officer would have no power to determine any fact or law, but would transmit the record of such hearing to the defendant Fahey, and his subordinates, who would then pass upon the validity of

their own acts. That no notice was given to Title Service Company of the time or place of said hearing and the only formal notice given to it was by publication of said order in the Federal Register. That such nonjudicial hearing could have had
78 no effect other than to further cloud the titles to the approximately 8,000 parcels of real property to which Title Service held the legal titles, as trustees, under the deeds of trust hereinabove referred to, and such administrative hearing would have amounted to an usurpation of the functions of the Federal district court by attempting to decide the validity of the acts of the defendants by themselves at hearing in which the defendants or their servants would have been the prosecutors, the triers of the facts and the interpreters of their own regulations, thus depriving all parties of their constitutional right to be heard and judged by an impartial tribunal. That it was deemed necessary to stay such hearing and that in order to do so, Title Service Company, through its said attorneys, did prepare and join with the attorneys for the plaintiffs, in moving for and obtaining a temporary injunction to stay such administrative hearing. That such proposed and so-called administrative hearing was permanently stayed and enjoined by the Court after a hearing, as will be hereinafter set forth.

VII

At no time since the 20th of May 1946, to and including the present time, has any documentary evidence been presented to Title Service Company, its officers or its counsel, of the appointment of the defendant A. V. Ammann as the purported conservator of the said Association. That without evidence of such appointment by any court or other judicial body, or at all, the defendant Ammann has presumed to make demands upon the Title Service Company to make reconveyances of titles held under deeds of trust, has accepted payment of balances due on promissory notes secured by deeds of trust and has erroneously and knowingly issued purported Requests for Reconveyance to such trustors and has directed them to apply to Title Service Company for reconveyances. That all of such acts by said defendant have caused Title Service Company, and its counsel, to have to make explana-
79 tions to each of said trustors as to why reconveyances could not be issued to them. Such acts have further resulted in the clouding of the titles to the real property involved by reason of the fact that in many instances such trustors have relied upon the inaccurate information so given them and have innocently executed conveyances to said real property to purchasers in good faith, have entered into contracts for the sale of such property and have even made new deeds of trust thereon.

VIII

That by reason of the fact that the relief sought by the plaintiffs in their original proceeding included injunctive relief predicated upon the claim that the statute under which the purported appointment of the defendant A. V. Ammann, as Conservator of the Association, was unconstitutional and that such appointment was, therefore, void, and that the enjoining of the administrative hearing, hereinabove referred to, was also predicated upon the claim that such statute was unconstitutional, such statute being Section 5 (d) of the Home Owners Loan Act of 1933, the hearing thereon was necessarily heard before a three-judge statutory Court. Said Court was composed of the Honorable William S. Orr, Judge of the Circuit Court of Appeals for the Ninth Circuit, the Honorable Dave Ling, Judge of the United States District Court of Arizona and the Honorable Peirson M. Hall, Judge of the District Court of the Southern District of California, Central Division. Said hearing was had after two continuances, for all of which preparations were made. The hearing took two judicial days and at its completion the Court requested the filing of further points and authorities.

In addition to the matters hereinabove referred to there was before the Court at such hearing, hearings on other motions brought by various other defendants to dismiss, quash service of and sundry other matters.

That after the filing of the comprehensive points and au-
80 thorities the matter stood submitted for several weeks; that thereafter the Court rendered its unanimous opinion holding the statute under which the appointment of the defendant A. V. Ammann had been made as hereinabove alleged, to be entirely unconstitutional and void as an improper delegation of legislative authority and not providing for due process as required by the Constitution of the United States and directing that judgment be entered accordingly.

That pursuant to the direction in said opinion counsel for Title Service Company, in cooperation with counsel for the Plaintiffs, for the defendant Association, and for the defendant and cross-claimant Robert H. Wallis, spent a great deal of time in the preparation of a proposed form of judgment.

That after said proposed form of judgment had been served upon counsel for the defendants Fahey and Ammann, objections to the proposed form of judgment were filed which required that the same be answered. That the preparation of such answers required considerable and diligent research and briefing by the attorneys for Title Service Company. That at about the same time that the objections to the proposed form of judgment were

served the defendants Fahey and Ammann served, and later filed, a request for a stay of execution and a memorandum of points and authorities in support of the same. That although such request for a stay of execution was premature and irregularly filed, it was necessary that counsel for Title Service Company to, and they did, prepare answering points and authorities. That thereafter, and on the 30th day of September 1946, the Court made and entered its judgment, adjudging that the appointment of the defendant A. V. Ammann, as Conservator of the Association, was void and of no effect and ordering the restoration of the assets of the Association and its management and control restored to its duly elected officers and directors; and did deny the requested stay of execution thereof.

81 IX

That immediately after the entry of said judgment, and without prior notice to any other parties, the defendants Fahey and Ammann, by the Solicitor General of the United States, did, on the 1st day of October 1946, apply to Mr. Justice Wiley Rutledge, Associate Justice of the Supreme Court of the Supreme Court of the United States, and did obtain from him an order staying the execution of the judgment theretofore made and entered in the District Court and further setting aside the effect of so much of said judgment as had theretofore been executed and ordering the restoration of the defendant Ammann to the possession and control of said Association, the latter order being unique in Supreme Court history. That Justice Rutledge did, in the course of said ex parte hearing, indicate his willingness to reconsider or vacate his ruling upon a sufficient showing being made therefor.

That had said stay of execution and mandatory order not been granted, and had the management and control of said Association been allowed to remain in the hands of the duly elected officers and directors of said Association, it would have been possible to provide marketable titles to the real property hereinabove referred to which were the subject matter of the deeds of trust wherein Title Service Company was the trustee. Therefore, it was deemed absolutely necessary for Title Service Company, as such trustee, to participate actively, in seeking to have said stay of execution and mandatory order vacated and set aside. To that end, counsel for the trustee actively participated in the preparation of the necessary documents to present an adequate showing before Justice Rutledge for this purpose. In this regard it was deemed necessary to present a complete record from the lower court and counsel for Title Service Company supervised the preparation of this record consisting of more than 1,800 typewritten pages.

82 They also participated in the preparation of the necessary petition to set aside and vacate the order theretofore made by Justice Rutledge, the affidavits in support thereof including many affidavits and a memorandum of points and authorities.

That the motion hereinabove referred to was presented to Mr. Justice Rutledge, and argued before him by counsel for the Plaintiffs, but that such presentation was made on behalf of all appellees in an endeavor to support the unanimous and unqualified judgment of this Honorable Court. That counsel for the Plaintiffs made a sufficient showing to convince Justice Rutledge of the great importance of the question involved as evidenced by the fact that a short additional time was granted by him for the preparation and submission of rebuttal matter to that presented by the appellants prior to the submission by Justice Rutledge of the motion to all nine justices of the Supreme Court, in conference. That by reason of the submission of such matter to the full Court it had been necessary to submit the records and all documents in ten copies, in addition to those necessary for service upon counsel.

X

That subsequent to the filing of the original cross-claim in interpleader by Title Service Company, and notwithstanding the fact that the defendant A. V. Ammann had actual knowledge of the inability of the trustee to issue reconveyances of title to real property predicated upon requests therefor executed by him, as the purported Conservator of the Association, and constructive knowledge of such facts obtaining by reason of the pendency of this litigation, the said A. V. Ammann continued to accept full payments of balances due upon promissory notes secured by deeds of trust which were the subject matter of the Bill in the Nature of Interpleader filed by Title Service Company; and did issue in the payers of said promissory notes requests for reconveyances exe-

83 cuted by himself, and did direct them to be presented to Title Service Company. That by reason thereof, Title Service Company, again found itself faced with conflicting demands for the issuance of reconveyances under deeds of trust and found it necessary, in order to relieve itself of multiple liability and multiple and vexatious litigation to deposit these promissory notes, deeds of trust and reconveyance with the Court, in interpleader. To that end counsel for Title Service Company did prepare, serve and file Notice of Motion to be Allowed to file Supplemental Interpleader, Motion to be Allowed to File Supplemental Interpleader, Supplemental Cross-Claim in Interpleader and Points and Authorities and Affidavit in support thereof. That upon the hearing of said motion, after several continuances thereof, Title Service

Company was allowed to, and did, file such Supplemental Cross-Claim in Interpleader and did deposit with the Registry of this Court, 25 sets of promissory notes, deeds of trust and requests for reconveyance thereof, which documents are still on file therein.

XI

That after the handing down of the unanimous opinion by the three-judge statutory District Court, and prior to the entry of judgment thereon, the activities of the defendant Ammann, as the purported Conservator for the Association, were such as to cause the Plaintiffs, the Defendants, Association and Title Service Company to become further apprehensive as to the dissipation of the assets of the Association, and of the records thereof. This was partially evidenced by the acceptance of full payments of promissory notes as hereinabove set forth. In order to attempt to stop such activities Title Service Company, through its counsel, joined with other parties to the action, now the other appellees, in bringing before the Court a motion to have the officers and directors restored to immediate possession of the assets and control of the Association. This motion was denied after a very lengthy
84 hearing but it demonstrated to the Court the necessity for an early making and entry of judgment.

XII

That by custom and usage in California it has become, and is, necessary to obtain a policy of title insurance upon the title to real property in order to have a marketable title. That by reason of the pendency of this litigation all title insurance companies have declined to issue policies of title insurance upon any real property which is the subject matter of a deed of trust wherein the Association is the beneficiary and Title Service Company is the trustee, without showing as an exception in said policy of title insurance the effect of the outcome of this litigation. That in order to obtain such policies of title insurance and marketable title, numerous parties have brought proceedings in intervention in this Court wherein they have sought and been allowed to deposit in the Registry of this Court the balance of the money claimed to be due upon their respective promissory notes, the defendant Ammann has been required to deposit the original promissory notes and deeds of trust and his request for reconveyance, together with any money paid to him since his seizure of the Association, the Association has been required to deposit its request for reconveyance and Title Service Company has been required to

deposit a reconveyance and the Clerk has been directed to deliver such reconveyance to the order of the petitioner in intervention and to retain all money and other documents, thereby substituting money for real property. That by reason of the responsibilities of the trust imposed upon it by said deeds of trust, Title Service Company through its counsel, has had the computation of all sums involved in said transactions and has had to appear in all of said intervention proceedings.

That of said intervention proceedings, there are interventions now pending in this court involving many parcels of real property.

85

XIII

That of the approximately 8,000 parcels of real property affected by this litigation there are approximately 400 parcels on which the owners and trustees are attempting to obtain clear and marketable titles in order to sell, refinance or otherwise deal with their said real property. That as a consequence thereof all of said parties are attempting to obtain information concerning the status of this litigation, means and methods whereby they can obtain marketable titles, etc. These inquiries have resulted in innumerable calls, both in person and by telephone, at the office of Title Service Company, and an average of three to five telephone and one personal call, daily, upon counsel for the company. In addition thereto there has been manifold correspondence by the company and its counsel with such persons.

XIV

That this litigation has brought forth almost innumerable questions of law which have been unique and have resulted in the necessity for very extensive and lengthly legal research and briefing of points involved. All motions made, as hereinabove set forth, required the submission of points and authorities and a digest of the facts involved, with an application of the applicable law to the facts.

By reason of the shortness of time involved in many of the proceedings, much of the work was, of necessity, done at night and outside of regular office hours, including Sundays and holidays, and, on several occasions, necessitated working all night and as much as thirty-six hours at a time by counsel. The total time of counsel involved was considerable in excess of half of the working time since the inception of the litigation and necessarily resulted in a neglect or total abandonment of such of counsel's

other legal practice. By reason of the large amounts of
86 money and value of property involved in the litigation, a far greater responsibility was placed upon counsel than would accrue in an ordinary case. That by reason of the trust relation imposed upon Title Service Company by virtue of its being named as trustee in so many deeds of trust, and the necessity for the making of momentous decisions as to policy and proceedings affecting so many persons, firms, and corporations as trustees, which responsibility was fixed in said deeds of trust, a tremendous responsibility was fixed upon the trustee and its counsel, upon whom fell the duty of making meat of such decisions and taking the requisite proceedings following therefrom.

XV

That by reason of the fact that the acts of the defendants Fahey and Ammann resulted in the clouding of the titles to the real property held by Title Service Company, as trustee, requiring it to take the steps which it did, were the same acts which caused the inception of the litigation, it has been necessary to coordinate the work of counsel for Title Service Company with that of counsel for the other parties who are new appellees in the Supreme Court, both before and after judgment. Therefore, counsel have worked in close cooperation and harmony and are still so working in order to sustain the judgment of this Court on appeal. That by reason of the vast amount of stenographic work attached to the preparation of the voluminous pleadings filed herein and the manifold numbers of copies required therein, it has been necessary for counsel to obtain additional stenographic help and to incur additional expense therefor. That the filing of the Lis Pendens herein, as set forth above, required the payment of a very large fee to the County Recorder of Los Angeles County, California. That all of such additional expense is set forth in Exhibit "A" attached hereto and by reference made a part hereof.

87 XVI

That the Court is familiar with great numbers of citations necessarily set forth in all of the points and authorities filed in support of all of the matters heard by this Court. That in the preparation thereof it was necessary to sift all of the statutes, rules, regulations, and case law on the subject, and, after discovering those most pertinent to the points at issue to follow each of them to the ultimate decision on each. That in order to uphold the judgment of this Court and sustain its judgment in the appeal now pending before the Supreme Court of the United States, it will

be further necessary for counsel for Title Service Company to make further research, prepare the requisite brief on the appeal, make the three thousand mile trip to Washington, D. C., and present oral arguments in support of the judgment. By reason of the Supreme Court rule limiting to two weeks the time for the preparation, printing and filing of the briefs of the appellees, it is necessary that the greatest amount of this work be done in anticipation of the receipt of the opening briefs of the appellants. Hence, counsel is now engaged in such research and briefing to the exclusion of all other matters, except current proceedings in intervention, this motion and other current matters in the instant litigation.

XVII

That there is money well in excess of $800,000 on deposit in the Registry of this Court from which the allowance of fees and expenses to counsel can be paid. That said money represents and has been substituted for the securities deposited by Title Service Company, in interpleader.

Wherefore, this moving defendant and cross-claimant respectfully prays that the Court make its order for an allowance to it of a reasonable amount on account of its attorneys' fees incurred herein to and including the 10th day of February 1947, and
88 that the same be made payable directly to its counsel, Thomas and Wallace; for an allowance to it of such amount as the Court may deem reasonable on account of its expenses incurred to date; and that all of said amounts be ordered paid from the money held on deposit in the Registry of this Court.

THOMAS AND WALLACE,
By (S) H. O. Wallace,
H. O. WALLACE,
Attorneys for Title Service Company.

89 EXHIBIT "A"

EXPENSES INCURRED BY TITLE SERVICE COMPANY

Stenographic service in preparation of Notice of Pendency of Action, 261 pages	$720.00
Recording fee of Notice of Pendency of Action, recorded June 27, 1946, Book 23421, Page 1, Official Records Los Angeles County, California	187.30
Services of investigator, checking titles, real-property descriptions, recordings, documents filed, docket, register of actions, etc	102.24
Long-distance telephone tolls	190.71
Travel expense of counsel, hearings	69.00
Total	1,269.25

90 THOMAS AND WALLACE
Attorneys for Title Service Company
602 Jergins Trust Building
LONG BEACH 2, CALIFORNIA
Telephone 727–61

In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421–PH

Affidavit in support of motion for allowance upon account of attorneys' fees, etc., by Title Service Company

PAUL MALLONEE, C. H. NEWHOUSE, AND WINNIE BUCKLIN, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS, SUING FOR, AND ON BEHALF OF, ALL THE MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

91 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

R. H. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

"SUB NOMINAE"

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANT

vs.

JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, FEDERAL HOME LOAN BANK OF PORTLAND, AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ALL ORGANIZATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES, THIRD PARTY DEFENDANTS

92 FEDERAL HOME LOAN BANK OF LOS ANGELES, A BODY CORPORATE, THIRD PARTY DEFENDANT AND CROSS-CLAIMANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES KNOWN AND REFERRED TO AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, A BODY CORPORATE, JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, AND PURPORTEDLY SERVING AS FEDERAL HOME LOAN BANK COMMISSIONER, CROSS-DEFENDANTS

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

NOTE.—There were 9 or more other Intervenors not herein named.

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

ROBERT H. WALLIS, THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

93 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

STATE OF CALIFORNIA,
County of Los Angeles, ss:

S. I. Bacon being first duly sworn, deposes and says:

That he is an officer of Title Service Company, a corporation, to-wit: the Vice President thereof.

That he is familiar with the litigation pending in the above entitled and numbered matter. That he has read the Motion for

Allowance Upon Account of Attorneys' Fees and Expense and Payment Thereof by Title Service Company which Motion is being filed concurrently herewith. That the allegations set forth in said Motion are true and correct and that the services of counsel therein alleged were in fact rendered and that the expense therein alleged to have been incurred were in fact incurred by Title Service Company. Dated this 6th day of March 1947.

(S) S. I. BACON.

Subscribed and sworn to before me this 6th day of March 1947.

[SEAL] (S) HAZEL ROBERTS,
Notary Public in and for said County and State.

94

THOMAS AND WALLACE
Attorneys for Title Service Company
602 Jergins Trust Building
LONG BEACH 2, CALIFORNIA
Telephone 727–61

In the District Court of the United States, Southern District of California, Central Division

No. 5421–PH

PAUL MALLONEE, ET AL., PLAINTIFFS
vs.
JOHN H. FAHEY, ETC., ET AL., DEFENDANTS

Memorandum of points and authorities in support of motion for allowance upon account of attorneys' fees, etc., by Title Service Company

Comes now Title Service Company, and Defendant and Cross-Claimant in Interpleader in the above entitled and numbered action, and in support of its Motion for Allowance Upon Account of Attorneys Fees and Expenses and Order for Payment Thereof presents the following points and authorities:

I

RIGHT TO INTERPLEADER TO ATTORNEY FEES

It appears to be clear and without question that a Federal court sitting in equity has the jurisdiction to entertain a proceeding in

interpleader. It is likewise clear that such court has the power and right to award attorney's fees to an interpleader. This has grown and developed with the equity courts throughout their life. One of the cases dealing with this subject arose in the District Court of the United States in the local district before the
95 late Judge Jones. It is: Massachusetts Mutual Life Ins. Co. vs. Morris, 61 Fed. (2d) 104 (1932–Cal).

In that case the plaintiff had issued its policy of life insurance and parts of the proceeds of such policy had been assigned by the beneficiary, which assignments were later repudiated. The beneficiary brought an action in the state courts for the collection of the amount of the policy. The insurance company commenced an interpleader ation in the federal district court and restrained the state courts from proceeding. The trial court denied attorney's fees on the theory that although equity courts had theretofore had power to award fees, no mention thereof was made in the new interpleader statute, 28 U. S. C. A. Sec. 41 (26), and that no right remained in the trial court to award fees. This position was reversed by the Circuit Court of Appeals. In its decision it was stated at P. 105:

"In Mutual Life Ins. Co. v. Bondurant, 27 Fed. (2d) 464, (Certiorari denied 278 U. S. 630, 49 S. C. 30, 73, L. Ed. 548). The Circuit Court for the Sixth Circuit had before it a decree denying counsel fees to appellant insurance company, which had instituted an interpleader proceeding under the Federal Interpleader Act to determine the rights of adverse claimants to the proceeds of a life insurance policy held by it. In holding that the interpleader was entitled to a reasonable attorney's fee, the court said:

" 'It is well settled that a stockholder, who brings the nonstatutory equity interpleader bill, is entitled to reasonable attorney's fees as well as other costs. McNamara v. Provident Sav. Life Assur. Soc. of N. Y. (C. C. A.) 114 Fed. 910; Louisiana State
96 Lottery Co. v. Clark, (C. C.) 15 Fed. 20. The interpleader Act effects no important changes in the substantive rights of parties to an interpleader suit; it merely enlarges the jurisdiction of federal courts over the necessary parties to certain interpleader suits. Nothing in the language or in the history of this essentially jurisdictional act evidences an intent that the rules as to costs and attorney's fees in a statutory interpleader should be different from those that prevail in the ordinary equity interpleader whether it be in the federal or the state courts.' "

The proceeding was reversed and remanded with instructions to Judge Jones to ascertain and allow a reasonable attorney's fee for the interpleader. The foregoing case was decided after the

adoption of the statutory interpleader but prior to the amendment of the statute into its present form, which amendment was adopted in 1936. That the adoption of the present amendment did not work may change in the powers or duties of the trial court to award attorney's fees is evidenced by the case of Tropines et al. vs. Sunshine Mining Co., 99 Fed. (2d) 651, (C. C. A. 9, 1938).

That case did not raise the question of whether or not the court had the right to award fees, but the reasonableness of the allowance was questioned on appeal. On P. 635 of the decision it was stated, parenthesis added:

"The District Court's decree awarded the company (interpleader) its costs and expenses (including attorney's fees) in the aggregate sum of $3,397.38). The award was proper, Mass. Mut. Life Ins. Co. v. Morris, 61 Fed. (2d) 104, and, we think, adequate. The company and other appellees will, of course,
97 recover their costs on appeal. Affirmed."

II

Right to Award of Attorney Fees for Bill in Nature of Interpleader

It may be contended that although a party who brings a strict interpleader is entitled to an award for attorney's fees that such rule does not apply in case of a Bill in the Nature of Interpleader. A Bill in the Nature of Interpleader is a bill in equity brought by a stockholder who may have an interest in the thing or fund at stake or who, like the title Service Company in this proceeding, does not have the physical custody of the property, or of all of the property, in question, and as a result cannot physically deposit all of it with the Court. The following cases definitely establish the right of such party to an award of attorney's fee. They are: Hunter v. Federal Life Ins. Co., 111 Fed. (2d) 551; Kohler v. Kohler, 104 Fed. (2d) 38; Kleber v. Maryland Casualty Co., 69 Fed. (2d) 934; Texas v. Florida, 306 U. S. 398, 83 L. Ed. 817, 121 AIE 1179; Standard Sur. Co. vs. Baker, 105 Fed. (2d) 578.

In the Hunter v. Federal Life Ins. Co. case, supra, decided in 1940, there was a dispute between parties entitled under a policy of life insurance on which changes of beneficiaries had been requested but not completed prior to death. Life insurance company interpleaded and deposited the proceeds of the policy in court. A defense was raised of no proper interpleader but the interpleading party was allowed attorney's fees by the court. It was held at P. 556.

"It would serve no useful purpose to discuss the sufficiency of the averments of the bill as a strict bill of interpleader, *since it was clearly sufficient as a bill in the nature of interpleader* [italics added], which may be maintained by one who is not a mere stockholder." Numerous cases cited.

98 and at P. 556:

"The last contention of the appellant relates to the Court's allowance of attorney's fees to the plaintiff and the guardian ad liten. She asserts that the court was without power to make any allowances, and that the allowances were excessive. Since the court had jurisdiction of the suit, there can be no question of its power to make reasonable allowances for attorney's fees."

Another case wherein the litigation was held to be a Bill in the Nature of Interpleader and the allowance of fees for the attorneys of the interpleading party was proper was the case of Texas v. Florida, 306 U. S. 398, L. Ed. 817, decided in 1938. This was a case wherein Green, the son of the famous Hetty Green, had claimed to reside in Texas, although he had, in fact, maintained residences in New York, Florida, and Massachusetts. All of these states claimed to be entitled to collect inheritance taxes. The heirs invoked the aid of the equity arm of the court in interpleader, admitting liability to some state and asking determination of the state entitled. It was alleged that since the heirs had a stake in the outcome of the proceeding that there was no true interpleader. It was held by the Supreme Court that even though the heirs did have an interest that they were exposed to multiple liability and vexatious and multitudinous litigation and were entitled by a bill in the nature of interpleader to avail themselves of the federal interpleader statute and have the full benefits thereof.

To the same effect is the case of Standard Surety & Casualty Co. vs. Baker, 105 Fed. (2d) 578 (C. C. A. 8–1938) wherein plaintiff had bonded a securities broker for $5,000.00. The broker became bankrupt and manifold claims were brought against plaintiff who filed interpleader and deposited in court. Dismissed by trial court on theory that all conflicting claims were not

99 to the same fund or arising from the same subject matter. It was held that even if it were not a true interpleader that it was a bill in the nature of interpleader and the plaintiff was entitled to the benefit of the interpleader statute.

In view of all of the foregoing cases it is clear that a party who bring a bill in the nature of interpleader is entitled to all of the benefits of the interpleader proceedings, including the award of attorney's fees for bringing the matter before the court.

III

Fees Allowed Payable from Fund Deposited

Any fees allowed as counsel fees are payable from the funds held in the Registry of the court and this is true whether the action be a pure interpleader or bill in the nature of interpleader and whether the interpleader is brought as an original action or is brought by cross-claim. Likewise, even should there be no liquid funds on deposit, the fees awarded may properly be made a lien against property held by the court.

In New York Life Ins. Co. v. Miller, 139 Fed. (2d) 657, C. A. A. 8–1944) the interpleader was raised by cross-claim, as in the instant case. Attorney's fees were allowed and it was held on appeal that the allowance was proper and that the fees were payable from the fund held on deposit. It was further held that it is immaterial whether the action be commenced by a bill in interpleader or whether the interpleading party appeared by cross-claim. This ruling was followed in Prudential Ins. Co. v. Texas, 45 Fed. Supp. 353.

The case of Stetsel-Weller Distillery, Inc. v. Norman, 38 Fed. Supp. 162, was a proceeding by bill in the nature of interpleader wherein title to a large amount of whiskey was in issue. The petitioner deposited warehouse receipts in lieu and posted bond. The court allowed counsel fees to the petitioner, and since there were no actual funds held by the court, it made such fees a
100 lien against the warehouse receipts and the goods represented by them.

IV

Fees Are Allowable Directly to Counsel

It has long been the practice of the courts to make the fees for counsel payable directly to them and it is proper practice for the motion or petition for the allowance of such fees to be made by the party litigant. The same rule applies here as in the case where an award is made to one who has created or preserved a fund which might otherwise have been dissipated. The principle is clearly covered in the following authorities: 49 ALR. 1155 and 107 ALR. 750; 14 Am. Jar. 48; Nolte v. Hudson Navigation Co., 47 Fed. (2d) 166.

V

When Allowance May Be Made

An allowance upon account of attorney's fees may be made in an interpleader proceeding at any time after the court takes jurisdiction thereof. It is most common to make them forthwith upon the adjudication that the party is a proper interpleader and making of an order discharging the interpleader from further liability. This was clearly enunciated in the case of Hunter v. Federal Life Ins. Co., 111 Fed. (2d) 511, and in the later cases which followed its doctrine.

Although it may be argued that there has been no adjudication in the instant matter, the holding of the trial court in its judgment that the defendants Fahey and Ammann had no right, title or interest in or to any of the interplead property and that the defendant Long Beach Federal Savings and Loan Association, through its officers and directors, was entitled thereto is a sufficient adjudication.

VI

Basis for Fixing Amount of Fees

In determining the value of the services rendered by counsel the Court is privileged to rely upon its own knowledge of
101 the same. Colloy v. Wolcott, 187 Fed. 585; Harrison v. Persa, 168 U. S. 311, 18 S. C. 129; 42 L. Ed. 478.

In so doing the Court should take into consideration the value of the property involved, the magnitude of the litigation and its total effect, the responsibility imposed on the trustee and its counsel, the time involved, the amount of work done for presentation to the Court and the additional work necessary in dealing with the makers and trustors under the promissory notes and deeds of trust.

Respectfully submitted.

Thomas and Wallace,
By H. O. Wallace,
H. O. Wallace,
Attorneys for Title Service Company.

102 CHARLES K. CHAPMAN
Attorney at Law, Ocean Center Bldg.
Long Beach, Calif.
Telephone 619–02

In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421 P. H.

Motion of Defendant, Cross-Claimant and Third Party Plaintiff Long Beach Federal Savings and Loan Association for allowance on account of fees for its attorneys

PAUL MALLONEE, C. H. NEWHOUSE, AND WINNIE BUCKLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR, AND ON BEHALF OF, ALL THE MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT

103 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

R. H. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

"SUB NOMINAE"

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANT

vs.

JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, FEDERAL HOME LOAN BANK OF PORTLAND, AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ALL ORGANIZATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES, THIRD PARTY DEFENDANTS

104 FEDERAL HOME LOAN BANK OF LOS ANGELES, A BODY CORPORATE, THIRD PARTY DEFENDANT AND CROSS-CLAIMANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES KNOWN AND REFERRED TO AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, A BODY CORPORATE, JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, AND PURPORTEDLY SERVING AS FEDERAL HOME LOAN BANK COMMISSIONER, CROSS-DEFENDANTS

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

NOTE. There were 9 or more other Intervenors not herein named.

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

ROBERT H. WALLIS, THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

105 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

Comes now the defendant Long Beach Federal Savings and Loan Association by its attorney, Charles K. Chapman, and moves the Court that an order be made allowing, from the assets of said Association, reasonable amounts to the attorneys representing said

Association. Said allowance should be made for the following reasons:

1. All assets, funds, and resources of the Association are either:

A. In the possession and control of the defendants Fahey and Ammann who have been adjudged to be trespassers by this Honorable Court, or

B. In the custody of the Clerk and Registry of this Honorable Court in the various interpleader proceedings.

2. That unless an allowance on account for services already performed and costs incurred and expended be made at this time, it will be impossible for said Association to adequately and properly present the vitally urgent matters, which may determine its very existence, to the United States Supreme Court.

3. That said defendants Fahey and Ammann are attacking and resisting the judgment of this court by appealing to the Supreme Court of the United States. That the affirmance or reversal of such judgment may determine the entire future of said Association, its 16,000 shareholder members, its 8,000 borrowers and the disposition of its $26,000,000 in assets.

4. Said attorney has performed tremendously valuable
106 services for said Association by assisting in securing a judgment of this Honorable Court ordering the removal of the defendants Fahey and Ammann from the custody and control of said Association's assets and declaring unconstitutional Section 5D of the Home Owners Loan Corp. Act, an Act of the Congress of the United States of America upon which defendants Fahey and Ammann based their authority to seize the said Long Beach Federal Savings and Loan Association.

In support of this motion and in substantiation of the reasons above stated, the affidavit of T. A. Gregory is attached hereto and made a part hereof.

Wherefore, the said Association prays this Honorable Court make its order allowing such sums as the Court determines to be reasonable to the various attorneys entitled thereto for their services rendered and costs expended and incurred in the protection of said Association and its assets and property.

Dated this 6th day of March 1947.

(S) Charles K. Chapman,
CHARLES K. CHAPMAN,
Attorney for Defendant, Cross Claimant, and Third Party Plaintiff Long Beach Federal Savings and Loan Association.

107 CHARLES K. CHAPMAN
Attorney at Law, Ocean Center Bldg.
LONG BEACH, CALIFORNIA
Telephone 615–02

In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421 P. N.

Affidavit of T. A. Gregory in support of motion of Long Beach Federal Savings and Loan Association for allowance on account of attorneys' fees

PAUL MALLONEE, C. H. NEWHOUSE, AND WINNIE BUCKLIN, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS, SUING FOR, AND ON BEHALF OF, ALL THE MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT

108 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

R. H. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

"SUB NOMINAE"

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANT

vs.

JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMAN AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, FEDERAL HOME LOAN BANK OF PORTLAND, AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ALL ORGANIZATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES, THIRD PARTY DEFENDANTS

109 FEDERAL HOME LOAN BANK OF LOS ANGELES, A BODY CORPORATE, THIRD PARTY DEFENDANT AND CROSS-CLAIMANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES KNOWN AND REFERRED TO AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, A BODY CORPORATE, JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, AND PURPORTEDLY SERVING AS FEDERAL HOME LOAN BANK COMMISSIONER, CROSS-DEFENDANTS

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENER

NOTE. There were 9 or more other Interveners not herein named.

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

ROBERT H. WALLIS, THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

110 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY ET AL., THIRD PARTY DEFENDANTS

STATE OF CALIFORNIA,
County of Los Angeles, ss:

T. A. Gregory, being first duly sworn deposes and says:

That he is President and one of the directors of the Long Beach Federal Savings and Loan Association and has occupied such position for more than 12 years last past. That he is completely familiar with the circumstances leading up to the seizure of said

Association by the defendants Fahey and Ammann, the matters involved in the litigation caused thereby, and the activities of attorneys for said Association.

That attached hereto, and incorporated herein by reference, the same as is set forth herein at length, are the following Exhibits:

A Statement of Costs Incurred by Attorney Charles K. Chapman, one of the attorneys for said Association, marked Exhibit A and incorporated herein by reference.

That Attorney Charles K. Chapman has been attorney for said Association since May 23, 1946, and has acted as attorney for said Association continuously since that time and is now acting as attorney for said Association. That he is a duly admitted and qualified attorney at law, licensed to practice in all the courts of the State of California, and admitted to practice in the Supreme Court of the United States, and before the United States District Court for the Southern District of California, and has been engaged in the practice of law for more than fifteen years.

That numerous complex and involved legal problems of
111 interpretation of substantive and procedural law were presented in said case. That primarily involved was the question of the validity and constitutionality of the law embodied in the Acts of Congress claimed by defendants Fahey and Ammann to give them authority and power to summarily and arbitrarily, without hearing, notice or statement of causes, to seize and confiscate the assets, property, and business of said Long Beach Federal Savings and Loan Association. That the determination of such questions involved intense research and study of the numerous and extensive regulations proposed to have been adopted by the defendants Fahey and Ammann under the authority of the said Acts of Congress, and further involved the question of the proper court in which to bring action to test the validity and constitutionality of the said Acts of Congress, of said regulations and the seizure by defendants proposing to act under them.

That all amounts involved were most substantial, the assets of said Association having aggregated $26,000,000 and various and numerous related side issues or breaches of the main litigation immediately ensued, all of them in multimillion dollar amounts.

That it was also imperative to so frame the policies and conduct of the officers and directors of said Association so as to protect to the utmost the rights of 16,000 shareholder members, more than 8,000 borrowers and the many millions of dollars of real property, bonds, notes and trust deeds, securities, accounts for collection, and other matters all directly and immediately involved and imperiled by the arbitrary and void attempted confiscation by the defendants Fahey and Ammann.

That the defendants Fahey and Ammann were withdrawing and transferring bank balances in the amounts of many millions of dollars standing in the name of said Association, were selling Government Bonds totaling more than $10,000,000, were assigning and transferring notes and deeds of trust aggregating more than $12,000,000. That said institution was immediately in-
112 volved in a run involving millions of dollars per day in withdrawals by its shareholder members which withdrawals aggregated approximately $10,000,000. That in framing its policy in the litigation which immediately ensued in efforts to restore said management and board of directors to the possession and operation of the said Association, it was necessary to exercise extreme care and judgment at each step in order not to add to the damage and destruction already caused and being continued by the defendants Fahey and Ammann, while at the same time not to waive or relinquish any of the necessary protection of the interests of said Association and its thousands of shareholder members and borrowers. That questions of constitutional law, interpretation of Acts of Congress, the validity and effect of such constitution, such acts and regulations thereunder, questions of jurisdiction of Federal courts, Federal procedure, California title insurance, customs, negotiable instruments law, general banking law, land conveyance, mutual associations, and the obligations of members therein, Federal corporations created by Acts of Congress, emergency war power litigation and executive orders purportedly adopted thereunder, were all interwoven and reacting upon every decision, plan, pleading, document and act throughout the entire proceeding.

That a mere statement of hours spent would not adequately present the enormous burdens and responsibilities involved in this situation.

That more than nine months have passed during which time said litigation has required constant and incessant consideration, planning and execution. That the efforts were fruitful may be best judged from the results achieved. Despite the necessities of the litigation to determine the validity of the action taken by defendants, the payment to the shareholder members wishing to withdraw their funds was never interrupted. The defendants were restrained on May 27, 1946 from merging or commingling the Long Beach Federal Savings and Loan Association as they
113 had merged and destroyed the Federal Home Loan Bank of Los Angeles, a $43,000,000 institution seized and merged by them a few weeks prior to the seizure of Long Beach Federal Savings and Loan Association. That a three-judge Federal Statutory court was covened and on September 5, 1946, after hearings, arguments, and submission of points and authorities, this

court decided that the acts of defendants Fahey and Ammann were unconstitutional and ordered their immediate removal from the premises, business, and assets of said Association which they had thus unlawfully seized.

That the matters presented in the points and authorities, pleadings, affidavits, argument, documents, and other matters disclosed by the file, represent only a small portion of the effort and time expended. For every authority cited, many more were read, considered and rejected. For every affidavit filed, many witnesses were interviewed and only those best informed selected. All pleadings and other documents were drafted and redrafted several times before being finally filed in the form presented to the court. The importance of every item of the litigation to the nation as well as to the community, to the welfare of the many thousands of innocent investors, borrowers and others involved together with the multimillion total amounts being dealt with called for the utmost and best possible effort and concentration on every matter presented.

During the progress of this case, ordinary office hours were ignored. 1 a. m., 2 a. m., and on many occasions all night through to dawn were the working hours involved in having ready vital matters urgently required on very short time limits. Of necessity other clients' matters were referred to other counsel or rejected entirely if new matters originated after the commencement of this litigation.

II

That every decision indirectly or directly involved the security and safety of all of the assets of said Association amounting to approximately $26,000,000 of the savings of the citizens of California and in addition, various "side issues" also in-
114 volved substantial amounts, for example, the original intervention by the Home Investment Company concerned approximately $800,000 in loans secured by first deeds of trust, assets of said Association.

The Association's cross-claim against Fahey and Ammann presented the issues concerning said seizure and confiscation of its $26,000,000 in assets. The third party complaint of the Association against the Federal Home Loan Banks, of Los Angeles, San Francisco, and Portland involved $10,000,000 in U. S. Government bonds transferred to and from one or more of said three Federal Home Loan Banks by said defendants Fahey and Ammann and also involved 10 to 12 million dollars worth of notes and deeds of trust owned by said Long Beach Federal Savings and Loan Association and pledged or assigned to said Federal Home Loan Bank of Los Angeles by the said defendants Fahey and Ammann.

Also involved was the ownership of $360,000 worth of stock in the said Federal Home Loan Bank of Los Angeles purportedly transferred by the defendants Fahey and Ammann to said Federal Home Loan Bank of San Francisco.

III

Affiant is informed and believes and therefore affirms:

That one of the principal purposes motivating defendants Fahey and Ammann in their illegal and unwarranted seizure of all funds and assets of the Long Beach Federal Savings and Loan Association without hearing, without notice, and without cause was to prevent the use of funds appropriated by the officers and directors for defense of said Association against its confiscation and destruction by the malicious and illegal acts of these same defendants Fahey and Ammann. That the result of said seizure by said defendants Fahey and Ammann is that all the assets, money, and property of said Association is either in the possession and control of the said defendants Fahey and Ammann or is deposited in the Registry and in the custody of this Honorable Court, and therefore, its assets are not available to
115 the owners or management to defend their rights unless relief is afforded by this Honorable Court by granting this motion.

IV

That all stages of the proceeding including the Congressional Investigation in Washington, D. C., the seizure itself, the litigation before the three-judge statutory court and particularly in the matters of the Stay of Execution issued by the U. S. Supreme Court and the vacating of the Stay, and the entire appeal, those defending said Association against the attacks of Fahey and Ammann and seeking to remove Fahey and Ammann from their usurped control of the business and assets of said Long Beach Federal Savings and Loan Association have been opposed by Fahey and Ammann using the Washington and Los Angeles offices of the Attorney General's office with its dozens of deputies, clerks, deputy attorneys, stenographers; Fahey and Ammann using the Washington main office, United States General's office with its numerous deputy attorneys, clerks, typists, secretaries, accountants, auditors, and other personnel; Fahey and Ammann using the Federal Home Loan Bank Administration system (of which the defendant Fahey is the completely unrestrained czar) with its numerous attorneys and legal staff, examiners, accountants, auditors, deputies, secretaries, typists, and other personnel, all with completely unlimited expense accounts both as to long dis-

tance telephone, airplane transportation, unlimited briefing research, the Federal Home Loan Bank Administration System with its also unlimited expense account, the Expenses of Which Purported Examinations and Audits Have Been Paid by the Defendants Fahey and Ammann to Themselves and Their Deputies From the Very Assets and Funds Which They Seized From the Control of the Officers and Directors of Said Association.

That opposed to this swarn eating at the assets of said Association have been only such resources as the shareholders' committee, whose savings were thus being consumed, have
116 been able to incur from other sources. That the defendants Fahey and Ammann have continued in their usurped possession despite recommendations of the Congressional Investigating Committee, despite the judgment of the three-judge statutory court at Los Angeles, and despite the dwindling of the deposits of said Association to almost one-half under their reign.

Affiant is informed and believes and therefore affirms that said defendants Fahey and Ammann will prolong said litigation to the utmost in furtherance of their purpose of destruction and liquidation of said Association by any method available.

V

That in addition to the enormous burdens already carried by those assisting the Association in its defense and efforts to remove the defendants Fahey and Ammann from their illegal and unauthorized seizure and confiscation of its business and assets, the additional burden of briefing, arguing, and presenting the defense of said Association before the Supreme Court of the United States in Washington, D. C., some 3,000 miles from their regular office and business, must be faced within a very few weeks by all counsel, parties, officers, and possible witnesses. That the burden of establishing the wrongdoing of the defendants Fahey and Ammann, and the unconstitutionality of the law under which they purported to act has been met up to this point without application to this court for assistance from the funds and assets of said Association.

That the tremendous bills for printing of extensive briefs, traveling expenses, hotel expenses, and cancellation or rejection of all other business during the period of preparation and argument of the Association's part of the appeal in the United States Supreme Court must also be met and carried.

That unless this Honorable Court makes its order slowing the use from the assets and funds of said Association of at least part of the amounts appropriated for such purpose by the
117 officers and board of directors prior to the seizure of said

Association by the said defendants Fahey and Ammann, the proper presentation of the Association's resistance of the appeal by the said defendants Fahey and Ammann cannot be met. That the Sustaining of the Judgment Directing the Removal of the Defendants Fahey and Ammann From the Property and Assets Which They Unlawfully Seized in Great Part Depends Upon an Adequate and Complete Presentation of the Law and Issues Involved to the Supreme Court of the United States. That such presentation cannot be properly made without the immediate assistance of funds and assistance from the assets and money of said Association either in the custody of the court or in the custody of the defendants Fahey and Ammann.

VI

Said Attorney Chapman consulted with and advised the officers and directors of said Association concerning their obligations and duties after the purported appointment of the said defendant Ammann as conservator of the said Association and particularly with reference to permitting said Ammann to continue to draw upon the bank accounts of said Association involving millions of dollars of Association's funds and as to whether or not to give stop orders to the banks in which said accounts were situated, and to the banks in which were deposited United States Government bonds of said Association in excess of $10,000,000 in value.

Said attorney also advised in connection with the honoring or rejection of requests for reconveyance, demanded of said officers and board of directors by those who had paid and were paying various amounts on notes and deeds of trust, assets of said Association aggregating approximately $12,000,000 in value. Said attorney also advised said officers and directors as to requesting a statement from the defendants Fahey and Ammann of the grounds if any, upon which they purported to seize said
118 Association's assets and business from the said officers and directors. Said attorney also advised said directors and officers as to requesting of a hearing which at the time of said request said officers rightfully believed would be before an independent and impartial tribunal, but which later they ascertained was to be a hearing "of Fahey, by Fahey and for Fahey."

Said attorney also advised in connection with the Answer, Cross-Claim and other presentation of the Association's part of the Federal Court litigation instituted and prosecuted by the committee representing the shareholders of said Association, whose savings and money was thus being seized and confiscated by the defendants Fahey and Ammann.

Said attorney also supervised interviewing of witnesses and securing of affidavits from the numerous witnesses present at the time of the invasion of the said Association's premises by defendant Ammann with no authority other than his own certification to his own order appointing himself a conservator; said attorney also advised said officers and directors as to all of the matters in connection with the intervention, Order to Show Cause, Motion for Leave to Intervene, Order Permitting Deposit of Money, Etc., in connection with the $800,000 intervention of the Home Investment Company seeking to free its titles to 174 homes entangled and clouded by the actions of defendants Fahey and Ammann; said attorney also prepared the Answer to the Cross-Claim in Interpleader of Title Service Company, trustee under the 8,000 deeds of trust aggregating $12,000,000 in value of assets of said Long Beach Federal Savings and Loan Association.

Said attorney also prepared the Answer to the Cross-Claim in Interpleader of the defendant Robert H. Wallis, who deposited with the clerk of the Federal Court a cashier's check for $50,000, part of an appropriation made by the board of directors of the Federal Association for its defense in the seizure and con-
119 fiscation by defendants Fahey and Ammann. Said attorney also prepared the Third Party Complaint against the Federal Home Loan Banks of Los Angeles, San Francisco, and Portland concerning the more than $10,000,000 in Government bonds and the more than $12,000,000 in notes and deeds of trust being sold, pledged, assigned, and transferred by defendants Fahey and Ammann to, from, and through one or more of the said three Federal Home Loan Banks, such transactions aggregating approximately $22,000,000 in total.

Said attorney also consulted and advised with counsel for other parties to the litigation as to the policy, attitude, and actions which would be taken by the said officers and board of directors in connection with all of the complex and intricate Motions, Pleadings, Affidavits, Resolutions, and other activities of said counsel for said various other parties. Said attorney also advised said directors and officers as to the formulation of the policies and replies to be made by said officers and directors to inquiries constantly received by them from other financial institutions contemplating, or about to have, dealings with various portions of the assets, property, money, loans, bonds, securities, and other matters concerning said Long Beach Federal Savings and Loan Association.

He also advised concerning the documents, evidence, and other matters to be produced at Washington, D. C., at the hearing of the Congressional Committee investigating the acts of defendants

Fahey and Ammann in their seizure and confiscation of the Federal Home Loan Bank of Los Angeles and the Long Beach Federal Savings and Loan Association.

Said attorney also advised said directors and officers as to what, if any, opposition, cooperation, or nonactivity was proper for said Association and its board of directors and officers in connection with all pleadings, affidavits, motions, statements, points, and authorities, and all other matters appearing in the file
120 of the above-entitled Federal Court action on the part of all parties thereto.

That an exact and detailed itemized statement of the activities of said attorney is not practical, as many matters overlapped, several were considered at the same time, and various matters apparently once disposed of were recalled for additional consideration upon each new development by the various parties litigant, upon each new ruling, order, or preliminary restraining order, judgment, appeals, application for stays and denials thereof, and other matters too numerous for detailed mention.

VII

That the continued existence of the Long Beach Federal Savings and Loan Association is directly involved and may be finally determined upon the appeal by defendants Fahey and Ammann to the United States Supreme Court. That said Association has already suffered, in the nine months of the reign of Fahey, more than $10,000,000 (almost one-half) in loss of its shareholder-members accounts. That of necessity said Association will continue to suffer additional loss and damage so long as defendants Fahey and Ammann remain in their usurped possession of its business and affairs. That if defendants Fahey and Ammann should succeed in their appeal, affiant is informed and believes and, therefore, alleges:

That the few remaining shareholder-members will also withdraw their money and said Association will be completely disintegrated and liquidated which affiant believes was the purpose of defendants Fahey and Ammann when they seized said Association. That affiant believes that a thorough, full, and complete presentation of the merits and facts of this action to the Supreme Court of the United States will result in affirmance of the decision of the three-judge statutory court and in the removal of the defendants Fahey and Ammann from their usurped powers
121 over the business and assets of *of* said association, and the recovery of the Association from the damage it has suffered under Fahey and Ammann. That the issues presented are of nationwide importance and involve the well-being and safety of

the nearly 1,500 Federal Savings and Loan Associations throughout the United States.

Wherefore, affiant prays that this Honorable Court make an allowance from the assets of said Association for the further defense and preservation of said Association from the attacks being made upon said Association by defendants Fahey and Ammann in the Supreme Court of the United States.

(S) T. A. Gregory,
T. A. GREGORY,
President Long Beach Savings and Loan Association.

Subscribed and sworn to before me this 6th day of March 1947.

[SEAL] BERTHA E. CUMPTON,
Notary Public in and for said County and State.

My Commission expires Dec. 26, 1949.

122 EXHIBIT "A"

COSTS INCURRED BY ATTORNEY CHARLES K. CHAPMAN RE. LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION

Long Distance Telephone Calls up to January 1st, 1947	$363.01
Partial transcripts, hearing at Federal Court, Los Angeles, up to July 22d	354.50
Total	717.51

123 CHARLES K. CHAPMAN
Attorney at Law, Ocean Center Bldg.
LONG BEACH, CALIFORNIA
Telephone 619–02

In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421 P. H.

Points and authorities supporting motion of Defendant, Cross-Claimant and Third Party Plaintiff, Long Beach Federal Savings and Loan Association for allowance for attorney fees

PAUL MALLONEE, ET AL., PLAINTIFFS

vs.

JOHN H. FAHEY, ET AL., DEFENDANTS

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

R. M. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

124 LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANT

vs.

JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, FEDERAL HOME LOAN BANK OF PORTLAND, AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ALL ORGANIZATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES, THIRD PARTY DEFENDANTS

FEDERAL HOME LOAN BANK OF LOS ANGELES, A BODY CORPORATE, THIRD PARTY DEFENDANT AND CROSS-CLAIMANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES KNOWN AND REFERRED TO AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, A BODY CORPORATE, JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, AND PURPORTEDLY SERVING AS FEDERAL HOME LOAN BANK COMMISSIONER, CROSS-DEFENDANTS

125 HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

NOTE. There were 9 or more other Intervenors not herein named.

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

ROBERT H. WALLIS, THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

Points and authorities supporting motion of Defendant, Cross-Claimant and Third Party Plaintiff, Long Beach Federal Savings and Loan Association for allowance for attorneys' fees

The officers and board of directors of Long Beach Federal Savings and Loan Association were trustees for the $26,000,000 in assets belonging to the 16,000 shareholder members of the Association. It was their duty to preserve said assets against
126 the unconstitutional attacks of Fahey and Ammann in illegally usurping and seizing possession and control of said assets and attorneys' fees thus incurred can be allowed by the court out of Association's assets. Trustees vs. Greenough, 105 U. S. 527, 25 L. ed. 1157; Sprague vs. Ticonic National Bank, 357 U. S. 101, 83 L. ed. 1184; Hinslow vs. Ferguson, 25 Cal. 2d 274, 153 Pacific 2d 714.

Defendants Fahey and Ammann could not be expected to sue themselves to determine the validity and constitutionality of their own acts. Neither could it be expected that defendants Fahey and Ammann would bring action to determine the validity of their own transactions transferring tens of millions of dollars of bonds, securities, notes, and deeds of trust to the Federal Home Loan Banks of either Portland, San Francisco, or Los Angeles (one of which banks the same defendants had, a few weeks previously, purportedly liquidated and dissolved and the other which they had at the same time attempted to create). The attorneys' fees incurred by the directors and officers under those circumstances were properly payable from the assets of the Association. Eggert vs. Pacific States Savings and Loan, 53 C. A. 2d 552, 127 Pacific 2d 999.

The destructiveness of Fahey and Ammann's unconstitutional seizure of the Association is demonstrated by the loss of $10,000,000 in shareholder accounts during the run immediately following such unconstitutional seizure. It was imperative
127 that said Association through its officers and directors take an active part in the above-entitled litigation instituted by the Shareholders' Committee. It was also necessary to notify

those receiving millions of dollars of the seized assets through the usurped authority of defendant Ammann that such transfers by Ammann were invalid. The cross-claim of the Association coupled with the Third Party Complaint against the Federal Home Loan Banks of Los Angeles, San Francisco and Portland were steps in this direction.

Respectfully submitted.

(S) Charles K. Chapman,
CHARLES K. CHAPMAN,
Attorney for Long Beach Federal Savings and Loan Association, Defendant, Cross-Claimant, and Third Party Plaintiff.

128 In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421 P. H.

Affidavit of John W. Preston in support of the several motions for the allowance of attorneys' fees made and filed in the above-entitled cause by the following parties: Paul Mallonee, C. H. Newhouse, and Winnie Bucklin, individually, and as representatives of a class suing for and on behalf of all members of the Long Beach Federal Savings and Loan Association; the Long Beach Federal Savings and Loan Association; and the Title Service Company

PAUL MALLONEE, C. H. NEWHOUSE, AND WINNIE BUCKLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR, AND ON BEHALF OF, ALL THE MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

129 R. H. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

"SUB NOMANAE"

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANT

vs.

JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, FEDERAL HOME LOAN BANK OF PORTLAND, AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ALL ORGANIZATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES, THIRD PARTY DEFENDANTS

FEDERAL HOME LOAN BANK OF LOS ANGELES, A BODY CORPORATE, THIRD PARTY DEFENDANT AND CROSS-CLAIMANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES
130 KNOWN AND REFERRED TO AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, A BODY CORPORATE, JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, AND PURPORTEDLY SERVING AS FEDERAL HOME LOAN BANK COMMISSIONER, CROSS-DEFENDANTS

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

NOTE.—There were 9 or more other Intervenors not herein named.

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

ROBERT H. WALLIS, THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

131 STATE OF CALIFORNIA,
County of Los Angeles, ss:

John W. Preston, being first duly sworn, deposes and says:

That he is now, and for more than forty-five years last past has been, a resident of the State of California.

That he was admitted to the Bar of the State of California on the 7th day of April 1902; and that he was previously admitted to the Bar of the State of Tennessee by the Supreme Court of the State of Tennessee.

That he is authorized to practice in all the State and Federal Courts of California, and that he was admitted to practice in the Supreme Court of the United States on the 8th day of December 1919.

That he was elected an Associate Justice of the Supreme Court of the State of California in November 1946 to fill out an unexpired term of approximately four years; that thereafter, in November 1930, he was duly re-elected such Justice for a full term of twelve years.

That thereafter and on the 1st day of October 1935, he resigned said office.

That except for the time spent upon the Bench, his practice has been confined almost exclusively to the work of a trial lawyer in contested litigation. That over the years, both as a lawyer and as a Judge, he has had considerable experience in the evaluation of the services of practicing attorneys in contested Court matters. That he has been requested to express his opinion as to the value of the services rendered in the above-entitled cause by the following named attorneys, to wit: (1) The firm of Westover and Smith, of Los Angeles, California, representing plaintiffs Paul Mallonee, C. H. Newhouse, and Winnie Bucklin, individually and as a Shareholders Committee representing the shareholder members of the Long Beach Federal Savings and Loan Association, and
132 Daniel W. O'Donoghue, Jr., of Washington, D. C., likewise representing said Shareholders Committee, particularly before the Supreme Court of the United States; (2) Charles K. Chapman, of Long Beach, California, representing the Long Beach Federal Savings and Loan Association; and (3) Thomas and Wallace, of Long Beach, California, representing the Title Service Company.

That as the basis for his opinion affiant has considered the affidavits made and on file in the above-entitled cause by the respective sets of counsel, and has assumed that the facts therein set forth are true. The said affidavits are identified as follows: (1) The affidavit of Wyckoff Westover, consisting of 24 pages; (2) The "Statement" of Daniel W. O'Donoghue, Jr., which is subscribed and sworn to before a Notary Public, consisting of 13 pages; (3) The affidavit of Charles K. Chapman, consisting of 18 pages; and (4) The affidavit of H. O. Wallace, consisting of 23 pages.

In addition to the foregoing, affiant has also assumed that it is incumbent upon him to evaluate the services of said attorneys, and each of them, as though their respective employments had terminated as of March 1, 1947.

Affiant has likewise assumed that his legal opinion as to the merits of the litigation, and the likelihood of an affirmance of the judgment of the Court below, may be treated as an element in the determination of said attorneys' fees.

That, in addition to the foregoing affidavits, affiant has studied a very large portion of the transcript on appeal to the Supreme Court of the United States in said cause.

That in his appraisal of the value of the services of the several sets of attorneys who have represented the plaintiffs, the Long Beach Federal Savings and Loan Association, and the Title Service Company, affiant has taken into consideration many highly important factors, among which are the following, to wit: (1) the magnitude and importance of the litigation, affecting the
133 rights and property of thousands of persons; (2) the large amount of money and property involved in the litigation, totalling many millions of dollars: (3) the novel and difficult questions of law arising under the facts of the case, and the learning and skill required of and manifested by counsel for the plaintiffs and associated litigants in briefing and presenting these questions to the Court; (4) the enormous amount of work required of and done by said attorneys and the immediate and pressing urgency thereof at almost every stage of the litigation, and even before the litigation could be commenced; (5) the unusual, and unique, character of the legal services rendered by said attorneys to their respective clients; (6) the very great strength of the opposition, an administrative body of the Federal Government; (7) the highly successful results of said attorneys' work and services, as evidenced by the judgment of the Three-Judge Court; (8) the usual and customary charges of attorneys for comparable services in Southern California; and (9) the probable effect of a successful termination of the litigation upon the status of the clients represented.

Affiant has taken into consideration the fact that this litigation has been, and is, fraught with unusual and difficult questions of law not found in the ordinary practice in contested cases; that the litigation is pitched in a unique and difficult field of the law; and that a vast amount of emergency work has been performed by counsel and, as affiant believes, this work has been performed with unusual skill.

That, in affiant's opinion, compensation of counsel could best be fixed by an over-all award in one sum to be prorated between them. This is true because each and all of counsel employed practically the same means to secure benefit for their respective clients. Although representing separate entities counsel, in large measure, cooperated in the work and sought the same general relief.

134 That, giving due consideration to the factors above mentioned and set forth, a division of the award, in affiant's opinion, should be based upon the relative burdens assumed and carried by respective counsel in the preparation and trial of the litigation.

It is, therefore, the opinion of affiant that the reasonable value of the services performed by all of the above named counsel from May 20, 1946, to March 1, 1947, is the sum of One Hundred and Twenty-five Thousand Dollars ($125,000.00). Affiant is of the opinion that said amount should be divided between said counsel as follows: To the firm of Westover and Smith, Fifty Thousand Dollars ($50,000.00); to Charles K. Chapman, Forty Thousand Dollars ($40,000.00); to the firm of Thomas and Wallace, Twenty-Five Thousand Dollars ($25,000.00); and to Daniel O'Donoghue, Jr., Ten Thousand Dollars ($10,000.00). Further affiant saith not.

John W. Preston.
JOHN W. PRESTON.

Subscribed and sworn to before me this 21st day of March 1947.

RETTA C. HARRISON,
Notary Public in and for said County and State.

135 L. R. MARTINEAU, JR.
Attorney at Law, 727 West Seventh Street
LOS ANGELES 14, CALIFORNIA
Telephone: VAndike 1014

In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421 P. H.

Affidavit of L. R. Martineau, Jr., attorney at law, in Support of the Motions of the Shareholder Members Protective Committee, the Long Beach Federal Savings and Loan Association, and Title Service Company for interim orders approving and allowing attorneys' fees paid or incurred

PAUL MALLONEE, C. H. NEWHOUSE, AND WINNIE BUCKLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR, AND ON BEHALF OF, ALL THE MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

136 R. H. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

"SUB-NOMINAE"

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANT

vs.

JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, FEDERAL HOME LOAN BANK OF PORTLAND, AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ALL ORGANIZATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES, THIRD PARTY DEFENDANTS

FEDERAL HOME LOAN BANK OF LOS ANGELES, A BODY CORPORATE, THIRD PARTY DEFENDANT AND CROSS-CLAIMANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES
137 KNOWN AND REFERRED TO AS FFDERAL HOME LOAN BANK *Bank* OF SAN FRANCISCO, A BODY CORPORATE, JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, AND PURPORTEDLY SERVING AS FEDERAL LOAN BANK COMMISSIONER, CROSS-DEFENDANTS

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

NOTE. There were 9 or more other Intervenors not herein named.

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

ROBERT H. WALLIS, THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY ET AL., THIRD PARTY DEFENDANTS

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY ET AL., THIRD PARTY DEFENDANTS

138 STATE OF CALIFORNIA,
County of Los Angeles, ss:

L. R. MARTINEAU, Jr., being first duly sworn, deposes and says: That affiant is a citizen of the United States of America and is now and since 1927 has been a resident of the State of California.

That in the year 1927 affiant was admitted to the Bar of the State of California, and has been in active and continuous practice in the State of California since said date except for such periods of time as his appointments and assignments in the practice of law have caused him to be absent from said State.

That in 1912 affiant was admitted to the Bar of the State of Utah by the Supreme Court of the State of Utah; that in 1933 affiant was admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit; that affiant was also admitted to the Bar of the State of Idaho by the Supreme Court of the State of Idaho; and that affiant is now a member of the State Bar of California, of the State Bar of Utah, and the Bar of the State of Idaho, of the Bar of the Supreme Court of the United States, and is authorized to practice in all State and Federal Courts of the State of California. That affiant's practice has almost exclusively been devoted to the fields of corporation law and finance, administrative law, and to trial practice in State and Federal Courts in contested matters, including specific work for the United States of America as Special Assistant to the Attorney General of the United States.

That affiant has been requested to give affiant's opinion of the value of the services rendered in the above-entitled cause by the following named attorneys:

1. Wyckoff Westover, Esquire, and Steadman Smith, Esquire, of the firm of Westover and Smith, of Los Angeles and Long Beach, California, and Daniel W. O'Donoghue, Jr., Esquire, of
139 Washington, D. C., representing plaintiffs Paul Mallonee, C. H. Newhouse, and Winnie Bucklin, individually, and as a Shareholder Members Protective Committee representing the shareholder members of Long Beach Federal Savings and Loan Association;

2. Charles K. Chapman, Esquire, of Long Beach, California, representing Long Beach Federal Savings and Loan Association;

3. Edison Thomas, Esquire, and H. O. Wallace, Esquire, of the firm of Thomas and Wallace of Long Beach, California, representing Title Service Company.

That affiant, as a basis of affiant's opinion, has studid the statements of fact made in the following documents on file in the above entitled cause, assuming the facts therein stated set forth to be true, namely,

a. The "Affidavit of Wyckoff Westover in Support of Motion for Interim Allowance of Fees and Expenses," consisting of 24 pages;

b. The "Statement of Legal Services of Daniel W. O'Donoghue, Jr.," consisting of 13 pages plus an exhibit of 1 page;

c. The "Affidavit of Attorney Charles K. Chapman in Support of Motion of Long Beach Federal Savings and Loan Association for Allowance on Account of Attorneys' Fees," consisting of 18 pages;

d. The "Affidavit of H. O. Wallace in Support of Motion for Allowance on Account of Attorneys' Fees by Title Service Company," consisting of 23 pages.

That in addition to the affidavits and the statement mentioned, affiant has read and considered the essential pleadings in the above entitled cause; the proceedings had before the Honorable Pierson M. Hall, United States District Judge; the proceedings had before the Honorable William E. Orr, United States Circuit Judge, the Honorable David W. Ling, United States District Judge, and the Honorable Pierson M. Hall, United States District Judge, sitting as a statutory court, convened pursuant to the provisions of
140 Section 380 (a) of Title 28 of United States Code; the judgment of the statutory court reported in 68 Federal Supplement, page 418, under date of September 5, 1946; a substantial part of the transcript on appeal to the Supreme Court of the United States in said cause; and the briefs and memoranda of points and authorities submitted by the attorney requesting this opinion, as well as those of United States District Attorney representing defendants John H. Fahey and A. V. Ammann.

That affiant has, for the purpose of this opinion, assumed that affiant's opinion on the merits of the litigation and on the probability of an affirmance of the judgment of the Court below, may be considered as a factor in the determination of attorneys' fees.

That in reaching the opinion herein set forth, affiant has taken into consideration the fact that the respective rights and interest of the several parties and groups of parties to the cause are not identical and that the rights and interest of the plaintiffs of the Long Beach Federal Savings and Loan Association and of the Title Service Company could not properly, in this cause, be protected by one attorney or one firm of attorneys, and affiant has, therefore, accepted as a fact, for the purpose of this opinion, that there has been a fruitful degree of cooperation between the attorneys representing the parties last mentioned in order to avoid the unnecessary duplication of work and expense.

That for convenience affiant has considered the work done and the services rendered down to March 1, 1947, and not thereafter, and not work and services which may thereafter be required; and that in reaching an opinion as to the reasonable value of such work and services rendered, affiant has given consideration primarily to several important factors, namely:

1. The character and extent of the services and the nature of the litigation which, among other things, required swift,
141 immediate, and aggressive action, involved the rights, interest, and properties of thousands of persons, embraced unusual and previously undetermined questions of Federal law, important not alone to the parties involved in the above-entitled cause but to the nation at large, necessitated extraordinary investigation of the facts giving rise to the litigation and called upon the attorneys involved to use extraordinary professional ability and learning;

ii. The amount of time devoted to the matter, from the latter part of May 1946, to March 1, 1947, severally, by the attorneys representing the plaintiffs and associated litigants, requiring on the part of one or more of said attorneys substantially every working day and in addition services which had to be performed on Sundays, holidays, and at night, to the exclusion of other work;

iii. The extraordinary nature of the employment for clients newly introduced to said attorneys and not clients on retainer or clients having business the history of which was already familiar to said attorneys;

iv. The extraordinary nature of the litigation in view of the acts of the administrative agents of the Federal Government, taken without notice or hearing and compelling immediate judicial control and review in a field of law which is in the process of development as a matter of jurisprudence;

v. The ability and standing of the attorneys employed by the plaintiffs and associated litigants evidenced not by their reputation alone but by the skill and learning with which the litigation was presented to the trial court and to the extraordinary statutory court, and the learning evidenced by the briefs and legal research submitted;

vi. The unusual amounts of money involved and the property rights concerned not only from the point of view of the ordinary citizen attempting to accumulate savings by thrift as a shareholder, but from the point of view of persons not even
142 directly concerned with the controversy, whose interests the attorneys for the plaintiffs and associated litigants have attempted to protect, with the resultant increase of professional responsibility upon said attorneys;

vii. The result attained before a distinguished statutory court, as evidenced by the judgment thereof, and the probability of the successful defense of the appeal prosecuted by a bureau of the United States Government; and

viii. The usual, reasonable compensation for like services within this jurisdiction.

That affiant has not, in making the enumeration of factors last mentioned, attempted an entirely comprehensive statement, but in summary has briefly stated certain principles which should govern this opinion relative to compensation in a litigated controversy involving matters of extraordinary gravity not only for the parties involved as plaintiffs and associated litigants, but also a matter of serious concern for the people at large in whom it is essential, in a democracy, to preserve a confidence in the activities of government; and that in the opinion of affiant the attorneys for plaintiffs and associated litigants have put not only professional skill and learning to the task but also perseverance and courage against heavy odds; and that these elements must necessarily be kept in mind in reaching an opinion as to the character, extent, novelty, and difficulty of this assignment.

That, notwithstanding the disparate interests of the plaintiffs and associated litigants, affiant is of the opinion that a proper award of compensation to March 1, 1947, may be made by the Court in one sum to be prorated among the several attorneys, as said attorneys may agree.

That affiant has considered the extent of the services preformed by said attorneys, respectively, and on that basis affiant is of the opinion the award might be properly divided.

That in the opinion of affiant the reasonable value of the
143 services performed by said attorneys representing said plaintiffs and associated litigants from May 20, 1946, to March 1, 1947, is the sum of One Hundred Fifteen Thousand Dollars ($115,000.00); and that said last named amount might properly be divided between said attorneys as follows: To Wyckoff Westover, Esquire, and Steadman Smith, Esquire, or the firm of Westover and Smith, the sum of Forty-eight Thousand Five Hundred Dollars ($48,500.00); to Daniel W. O'Donoghue, Jr., Esquire, the sum of Nine Thousand Dollars ($9,000.00); to [illegible] K. Chapman, Esquire, the sum of Thirty-four Thousand Five Hundred Dollars ($34,500.00); and to Edison Thomas, Esquire, and H. O. Wallace, Esquire, or the firm of Thomas and Wallace, the sum of Twenty-three Thousand Dollars ($23,000.00).

Further affiant sayeth not.

L. R. Martineau, Jr.
L. R. MARTINEAU, Jr.

Subscribed and sworn to before me, this 21st day of March 1947.

[SEAL] ALICE M. GIESCHEN,
Notary Public in and for the State of California, County of Los Angeles.

My commission expires November 1, 1947.

144

LAW OFFICES
WESTOVER & SMITH
Suite 1007–1015 Pacific Southwest Building
815 West Sixth Street
LOS ANGELES 14
Trinity 8791
Attorneys for Plaintiffs

In the District Court of the United States Southern District of California, Central Division

No. 5421 P H

PAUL MALLONEE, ET AL., PLAINTIFFS

vs.

JOHN H. FAHEY, ET AL., DEFENDANTS

Affidavit of Wyckoff Westover in support of motion for interim allowance of fees and expenses

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Wyckoff Westover, being first duly sworn deposes and says:

That he is a member of the firm of Westover & Smith, Attorneys, who are engaged in the practice of law at Suite 1007–1015 Pacific Southwest Building, Sixth and Spring Streets, Los Angeles, California.

That your affiant is a member of the Bar of the State of California, admitted to practice law before all courts in the State of California, and is admitted to practice law in the United States District Court, and is a member of the Bar of the Supreme Court of the United States.

That on May 22, 1946, negotiations were opened with your affiant by certain shareholder members of the Long Beach Federal Savings and Loan Association, which resulted in the firm of Westover & Smith being retained to supervise the creation
145 of and represent a Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association for the purpose of bringing an appropriate class action for and on behalf of all of the shareholder members, then comprising some approximately sixteen thousand (16,000) persons of the entirely solvent twenty-six million dollar ($26,000,000.00) association which had recently been forcibly seized on May 20,

1946, by the defendant A. V. Ammann, as purported conservator, and other persons, without any trial, notice, or hearing.

That your affiant immediately made a preliminary investigation of some of the questions of law involved, including questions as to the constitutionality of the Federal Home Owners Loan Act of 1933, as amended, which indicated that the delegation to the Federal Home Loan Bank Administration by Congress of the unlimited and unrestrained authority to enact Legislation as to the appointment of conservators, receivers, administrators, and to provide for the liquidating, merging, etc., of Federal Savings and Loan Associations was probably repugnant to the United States Constitution.

The next major preliminary question was where should the action be brought and since it appeared likely that the title to a great many parcels of real property in southern California had been clouded by the acts of the purported conservator, A .V. Ammann, in attempting to deal with such parcels of real property, it seemed that the action was local in character and should be brought in the U. S. Federal Court in the District where such real property was located.

Immediate action was absolutely essential to prevent the purported conservator from effectuating a merger of said association with some other association and irrevocably commingling the assets of said association with the assets of other associations as had been previously done on March 29, 1946, by the same defendant John H. Fahey and his staff, when they, without notice, seized,
liquidated, commingled and merged the entirely solvent
146 forty-three million dollar ($43,000,000.00) Federal Home
Loan Bank of Los Angeles with the entirely solvent nine Million dollar ($9,000,000.00) Federal Home Loan Bank of Portland and moved the commingled assets of said two banks to San Francisco, all of which acts were done on the same day by fiats issued by the Federal Home Loan Bank Administration.

The shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association was promptly formed, appropriate application for licenses, under Chapter 784 of the Statutes of 1937 of California, was filed with the Division of Corporations of the State of California, which ultimately resulted in licenses being issued to Paul L. Mallonee, C. H. Newhouse, and Miss Winnie Bucklin, the plaintiffs herein, to act as the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, and appropriate authorizations and proxies were thereafter prepared under the supervision of your affiant and printed and circulated and ultimately the Shareholder Members Protective Committee received authorizations and proxies executed, so your affiant is informed, by more

than fifty percent (50%) of the shareholder members of the Long Beach Federal Savings and Loan Association.

That immediately upon being retained by said committee, your affiant prepared and filed the complaint herein on May 27, 1946, and at the same time filed an appropriate motion with supporting affidavits and documents praying for a temporary restraining order, which was duly issued forthwith, restraining the defendants John H. Fahey, A. V. Ammann, and their staff from merging said association of commingling its assets with any other association.

Notice and motion for preliminary injunction to restrain the merger and the commingling of assets, supported by appropriate affidavits and points and authorities were prepared and filed
147 by your affiant requesting the issuance of a preliminary injunction to be followed ultimately by a permanent injunction, all of which motions raised the question of unconstitutionality of Section 4 (d) of the Federal Home Owners Loan Act of 1933.

Appropriate summons were prepared, issue obtained and delivered to the U. S. Marshal with instructions for service upon various defendants, including the Long Beach Federal Savings and Loan Association and its officers and the Title Service Company, the named trustee in most of the trust deeds of record securing notes for loans made by the Long Beach Federal Savings and Loan Association.

A thorough investigation into the facts surrounding the seizure of said association and its twenty-six million dollars ($26,000,000.00) of assets by the defendants, John H. Fahey and A. V. Ammann, was undertaken by your affiant.

A motion for order for service upon an absent defendant, pursuant to the provisions of Section 118 of Title 28 of the United States Code, supported by appropriate affidavits and pleadings was prepared, filed, and an order obtained thereon.

Arrangements were made for the service of the pleadings, which service was made upon the defendant John H. Fahey by the local U. S. Marshal serving the U. S. Attorney General, and the Marshal at Washington, D. C. personally serving the defendant John H. Fahey.

Alias summons were prepared, and issued and the Marshal instructed to serve them upon Robert H. Wallis, sued as John Doe number Two.

Service was made upon all defendants eventually, both locally, and, pursuant to order, upon the absent defendant John H. Fahey, in Washington, D. C.

Defendant Title Service Company, filed its answer and cross-claim in interpleader and bill in the nature of interpleader.

148 Bill in the nature of interpleader set forth that there were trust deeds on Southern California real property outstanding of record, in which the defendant and cross-claimant in interpleader was named as trustee, amounting to approximately eight thousand (8,000) in number, and having a face value of approximately twelve million dollars ($12,000,000.00).

Appropriate motions were made, from time to time, which resulted in the continuance of said temporary restraining order to prevent merger pending preliminary framing of the issues in said litigation.

Thereafter, the answer and cross-claim in interpleader of defendant Robert H. Wallis was duly filed and deposit made in the Registry of the U. S. District Court at Los Angeles of a Cashier's check for fifty thousand dollars ($50,000.00).

A cross-claim in interpleader and bill in the nature of interpleader was filed by the defendant Title Service Company, which resulted in there being deposited in the Registry of the U. S. District Court at Los Angeles, pursuant to appropriate court order, one hundred and seventy-four (174) trust deeds, which, after appropriate pleadings resulted in there being deposited in the Registry of the United States District Court at Los Angeles by the Home Investment Company, the sum of approximately seven hundred seventy four thousand, nine hundred twenty-seven and 90/100 dollars ($774,927.90) in cash in satisfaction of the notes secured by said one hundred seventy-four (174) trust deeds.

Thereafter affiant prepared and filed notice and motion, together with supporting affidavits and points and authorities for a temporary order and for a preliminary injunction to restrain the holding of an abortive administrative hearing, which the defendants John H. Fahey and A. V. Ammann were attempting to hold involving the same subject matter and raising some of the same questions as involved in the current litigation, and by which
149 they were attempting to deprive the local U. S. District Court of its jurisdiction to hear and determine this said matter.

Pursuant thereto, temporary restraining orders were duly issued by the U. S. District Court, and ultimately both preliminary and permanent injunctions restraining the holding of the said abortive administrative hearing were issued by the statutory three (3) judge court.

That in support of said motions, it was necessary for and counsel did obtain and review the evidence presented before the Congressional Committee, which had held hearings to investigate executive agencies committing acts beyond the scope of their authority, which said committee thoroughly investigated the seizure of the Federal Home Loan Bank of Los Angeles, and the seizure

of the Long Beach Federal Savings and Loan Association of Long Beach, and as a result of its investigations and hearings recommended in its report rendered in July, 1946, among other things:

"(2) That the Commissioner take all necessary steps to reestablish a Federal Home Loan Bank of Los Angeles and a Federal Home Loan Bank of Portland, and revoke the order or orders which the assets of these two district banks were intermingled.

"(4) That the Commissioner revoke the order appointing a conservator for the Federal Savings and Loan Association of Long Beach and restore the assets and affairs of the association to its duly elected management, and render a proper accounting for the same, as expeditiously as is consistent with judicial determination of the questions at issue * * *."

July 1946 Report of the Select Committee to Investigate Executive Agencies, Tenth Intermediate Report, Pursuant to H. Res. 88.

150 That extensive memorandum in opposition to the plaintiffs' motion for a preliminary injunction to restrain merger, with supporting affidavits and points and authorities, were filed, by the defendant A. V. Ammann, which were duly reviewed and considered by your affiant, research of all points and citations made and appropriate responsive statements and points and authorities prepared and filed on behalf of the plaintiff by your affiant and other attorneys working under his supervision.

That the defendant A. V. Ammann made a motion to dismiss said action, supported by extensive points and authorities and affidavits and other documents, all of which were duly received, considered, and exhaustive research of all points and authorities made by your affiant and other attorneys working under his supervision, and in response thereto, your affiant prepared and filed on behalf of the plaintiff, appropriate statements, affidavits, and points and authorities in opposition to the defendant Ammann's motion to dismiss.

Thereafter, upon notice and petition duly made, the Home Investment Company was allowed to and did intervene in said action and file its complaint in intervention, involving some one hundred seventy-four (174) notes, secured by trust deeds upon southern California real property.

Subsequently, after numerous continuances, the court made its order fixing the 15th day of July 1946, for the hearing by the statutory court composed of three (3) judges, of all motions in said litigation then remaining unheard and undecided, including the motions to dismiss and including the motions for injunctions to restrain the conservator from merging the said association with other associations or the commingling of its assets, and restraining

the defendants John H. Fahey and A. V. Ammann, and the Federal Home Loan Bank Administration from holding abortive administrative hearings, conflicting with the matters then pending in this litigation before the U. S. District Court.

151 Appropriate notices of hearing to be held by a court composed of three (3) judges were prepared, served and filed, pursuant to the requirements of Section 380 (a) Title 28 of the United States District Code.

Memorandum of defendants John H. Fahey and A. V. Ammann, with supporting affidavits and points and authorities in opposition to the plaintiff's motion for a preliminary injunction to restrain the holding of the administrative hearing in conflict with the matters pending in the U. S. District Court was duly received, reviewed, considered, and exhaustive research of all points and authorities made, and appropriate responsive memorandum, points, and authorities prepared, served, and filed by your affiant or other counsel working under his supervision.

Subsequently, notice and motion to dismiss or in lieu thereof to quash return of summons, with supporting affidavits and extensive points and authorities was filed by the defendant John H. Fahey, which documents were received, reviewed, considered, and exhaustive research of all points and authorities made by your affiant or other counsel working under his supervision.

Thereafter, the Long Beach Federal Savings and Loan Association filed its third party complaint, which document was duly reviewed and considered by your affiant as to its effect upon the litigation instituted by the plaintiff.

The complaint in intervention of the Home Investment Company of Long Beach, having heretofore been permitted to be filed, your affiant made appropriate answer thereto for and on behalf of the plaintiff Shareholders Protective Committee.

Ultimately appropriate order was made by the Honorable U. S. District Court directing that reconveyances pursuant to said one hundred seventy-four (174) trust deeds be made and directing the manner of payment of the balance due on the notes secured thereby, and defining the rights of the parties.

152

Subsequently the Long Beach Federal Savings and Loan Association filed its cross-claim and third party pleading, praying that the Federal Home Loan Banks of Los Angeles, Portland, and San Francisco be made parties to said action and the existence, if any, of said banks, be determined and the rights of the parties be defined.

Subsequently on July 15, 1946, and thereafter, the matters then pending in said U. S. District Court were duly and exhaustively argued and presented to the Honorable William E. Orr, U. S. Circuit Judge, and the Honorable David W. Ling, U. S. District

Judge, and the Honorable Peirson M. Hall, U. S District Judge, sitting as a statutory court, convened pursuant to the provisions of Section 380 (a) of Title 28 of U. S. Code.

Thereafter, pursuant to the court's suggestion, your affiant prepared and filed a forty-four page comprehensive recompilation of some of the pertinent points and authorities upon the subject of the unconstitutionality of Sections 5 (a) and (d) of the Home Owners' Loan Act of 1933, as amended.

Subsequently there was filed by the firm of O'Melveny & Myers, on behalf of the Federal Home Loan Bank of Los Angeles, its answer and cross-claim to enforce legal and equitable claims and to obtain possession of and to remove the liens from and clouds upon titles to real property and for other relief, which pleadings were carefully reviewed and considered by your affiant as to their effect upon the litigation instituted by the plaintiffs.

Thereafter, on September 5, 1946, the statutory court composed of the Honorable William E. Orr, U. S. Circuit Judge, the Honorable David W. Ling, U. S. District Judge, and the Honorable Peirson M. Hall, U. S. District Judge, issued and filed its opinion,
153 holding that Section 5 (d) of the Home Owners' Loan Act of 1933, as amended, was unconstitutional and void, as an unlimited attempt to delegate their legislative power, and that the acts of the purported conservator being bottomed upon said unconstitutional enactment were void.

That pursuant to the direction of said Honorable Court and in conformance with its opinion so rendered, your affiant duly prepared findings of fact, conclusions of law, and judgment which was duly served upon all parties, and filed with the Honorable Court.

That, thereafter, the defendant A. V. Ammann filed extensive objections to the proposed findings, conclusions of law, and decree, supported by points and authorities and likewise at the same time filed his request for stay of execution of said judgment, which documents were duly received, reviewed, considered, and exhaustive research of all points and authorities made, and appropriate responsive memorandum and points and authorities made by your affiant or other counsel working under his supervision.

That your affiant prepared and filed on behalf of the plaintiff, comprehensive points and authorities supported by a summarization of affidavits already on file, in opposition to the defendant A. V. Ammann's motion requesting a stay of execution.

That pending the settling of said findings of fact and conclusions of law and decree, and in order to prevent further damage to said association and to prevent the dissipation of the assets of said association, it became necessary, and your affiant, on behalf of the plaintiff, prepared, filed, and upon appropriate notice, made

a motion requesting a temporary mandatory restraining order to enjoin the defendants A. V. Ammann and John H. Fahey from continuing their unlawful interference with the proper operation of the Long Beach Federal Savings and Loan Association by its duly elected directors and officers, which said motion was supported by comprehensive affidavits and exhaustive points and authorities,

154 which said motions were duly brought on for immediate hearing and exhaustively argued, and ruling made by the Honorable Peirson M. Hall, Judge of the United States District Court, denying said motion for temporary restraining order upon the stated ground that irrespective of the merits of the motion, it was doubtful if a single judge of the district court had jurisdiction to entertain such a motion covering substantially the same matters which had been heard and determined by the Statutory Court composed of three (3) judges.

Thereafter, upon September 30, 1946, findings of fact, conclusions of law, and decree were duly signed by all of the three judges composing the statutory court, and were duly entered in Book 40, at pages 86 to 98 of Judgments on September 30, 1946, and concurrently therewith on the same date, the three judges of the said statutory court, unanimously denied the request for stay of execution of the defendant A. V. Ammann.

That immediately thereafter, your affiant prepared and had issued a writ of assistance and possession and subsequently the same day and night, the U. S. Marshall, at least partially restored possession of said association and its assets to the duly elected officers and directors of the Long Beach Federal Savings and Loan Association.

That immediately thereafter, to wit, on October 1, 1946, in Washington, D. C., and one day after entry of judgment in Los Angeles, California, and prior to the filing of any appeal, there was issued by the Honorable Wiley Rutledge, Associate Justice of the United States Supreme Court, his order, staying the execution of said judgment and mandatorily requiring that "If the said directors have already taken possession of the Long Beach Federal Savings and Loan Association, that the conservator be placed back in possession forthwith."

That, thereafter, the said order staying execution of said decree was duly served upon the officers and directors of the Long Beach

155 Federal Savings and Loan Association, and possession of said association was again transferred from them to the purported conservator. A. V. Ammann.

That thereafter, the defendants John H. Fahey and A. V. Ammann filed their petition for appeal, jurisdictional statement, citation, statement directing attention to Rule 12 (3) Revised

Rules of the United States Supreme Court, and their assignment of error, raising some nineteen (19) claims of error.

Whereupon the United States District Court at Los Angeles duly made its order allowing said appeal.

There have been filed herein notices of motion, together with motions for leave to intervene, with supporting complaints in intervention and requests for orders to show cause why such complaints in intervention should not be allowed by twelve (12) different parties praying leave to pay off by depositing in court the balances due at the time of seizure, plus interest to date and to thus clear the title to some twenty-one (21) different parcels of southern California real property.

Thereafter, the Title Service Company filed its supplemental cross claim interpleading some twenty-five (25) additional notes and trust deeds on real property in southern California, involving an additional amount of thirty-one thousand, one hundred thirty-one and $^{90}/_{100}$ dollars ($31,131.90).

Thereafter, the appellants filed their precipe for record on appeal and the appelles, after review of the name, made their demand for the inclusion in the record on appeal of additional documents.

Although repeated demands had been made orally, upon the defendant reported conservator for an inventory or statement of the assets of said association seized by him on May 20th, no such inventory had either been produced or delivered to the plaintiff, and therefore on October 22, 1946, formal demands for inventories and reports of the claimed audits being made by the said defendants

Fahey and Ammann and their staffs, were prepared and
156 served upon the defendants John H. Fahey and A. V.
Ammann, to wit, locally and in Washington, D. C., and ultimately on November 6, 1946, for the first time the plaintiffs were furnished with so-called inventory comprising one hundred ninety-six (196) pages of the assets of said association, amounting to twenty-six million, four hundred thirty-one thousand, three hundred eight and $^{09}/_{100}$ dollars ($26,431,308.09), admittedly seized by the defendants John H. Fahey and A. V. Ammann, and in which inventory the cash actually seized is set forth as office cash eighty thousand dollars ($80,000.00) even, and petty cash of twenty-five dollars ($25.00) even, and yet no figure is set up for the cash on hand in the office of the association in cash drawers at the time of said seizure and which your affiant is informed and believes and upon such information and belief alleges the defendant A. V. Ammann was requested to count at the time of the seizure, but declined so to do.

Thereafter, on October 21, 1946, a separate answer was filed to the cross claim in interpleader of Robert H. Wallis, by defendant A. V. Ammann.

Thereafter, on October 21, 1946, after the said defendants John H. Fahey and A. V. Ammann had appealed to the United States Supreme Court, upon notice, made the following motions, to wit:

1. Motion by John H. Fahey to strike and motion to dismiss answer and cross-complaint of the defendant the Long Beach Federal Savings and Loan Association.

2. Motion by defendant A. V. Ammann to strike and motion to dismiss the answer and cross-complaint of the defendant Long Beach Federal Savings and Loan Association.

3. Motion by John H. Fahey, defendant, to dismiss the cross-complaint of the defendant Title Service Company, or in lieu thereof to quash return of service of summons.

4. Motion by defendant John H. Fahey to dismiss the cross-complaint in interpleader of the defendant Robert H. Wallis, or in lieu thereof to ffuash return of service of summons.

5. Motion of defendant John H. Fahey to dismiss the complaint.

157 That all of the above said motions were supported by extensive points and authorities which were received, reviewed, considered, and thereafter motion for order extending time, supported by appropriate affidavits, upon notice was duly made by your affiant and other counsel and the court thereupon made its order allowing the plaintiffs and other appellees an extension of time to answer or file responsive pleadings to said motion, until thirty (30) days after the decision on appeal in said matter, as many of the questions raised by said motions were questions already argued and decided and now pending on appeal.

That thereafter, your affiant prepared and filed on behalf of plaintiffs herein, appellees' supplemental designation for additional portions of the record on appeal to include the notices, motions and supporting affidavits filed by the appellants subsequent to their having taken an appeal to the United States Supreme Court on such matters as were already included in their said appeal.

That thereafter there was filed, upon notice, with supporting affidavits and documents, a motion to be allowed to intervene and for an order for reconveyance, together with proposed complaint in intervention, upon which, after various hearings and amendments thereto, by agreement of the parties, the court made its order in favor of the intervenors, Dorothy and Theodore King ordering the conservator and them to deposit in the Registry of the court, the balance due on said note and to thereby ultimately receive reconveyance of title to their property.

That thereafter, there was filed on behalf of Erick and Ida Flodine, upon notice, with supporting affidavits and documents a motion to be allowed to intervene and for an order of recon-

veyance, together with proposed complaint in intervention for the purpose of clearing the title to a certain parcel of real property, upon the payment into the Registry of the court by the conservator of the moneys received by him, and the balance of the moneys unpaid on said note.

158 Thereafter, on November 6, 1946, upon notice, a motion to vacate the order of the court previously made allowing the filing of the third party complaint of the Long Beach Federal Savings and Loan Association and of the cross-claim of the Federal Home Loan Bank of Los Angeles, and to strike such pleadings and to dismiss the same, together with supporting points and authorities was filed on behalf of the Federal Home Loan Bank of San Francisco, which were received, reviewed, considered, and thereafter motion upon notice and with supporting affidavits and points and authorities for an order extending time to oppose the said motion of the Federal Home Loan Bank of San Francisco in re the vacating of the order permitting the filing of the third party complaint of the Long Beach Federal Savings and Loan Association and of the cross-claim of the Federal Home Loan Bank of Los Angeles was duly served and filed, and thereafter, the court made its order on November 15th, placing the said motions off calendar, with permission for them to be restored to the calendar by motion, upon thirty (30) days notice after the service and filing of written statements of reasons in opposition thereto and answering points and authorities.

The first amended complaint in intervention, on behalf of Dorothy and Theodore King, together with a motion by intervenors for an order of reconveyance, supported by affidavits and upon notice was duly filed and pursuant thereto, after hearing, the court made its order for reconveyance upon completion of the conditions set forth in said order.

Thereafter, on behalf of Flavy R. Miller, there was filed a motion upon notice, for leave to intervene, with supporting affidavits and attached petition of intervention, which resulted in the court's ultimately issuing its order, permitting intervention and directing the deposit of the unpaid balance of said note in the Registry of the court.

Thereafter, on behalf of Katherine A. Bell, there was filed a motion upon notice, for leave to intervene, with supporting affidavits and attached petition of intervention, which resulted in the court's ultimately issuing its order, permitting intervention and directing the deposit of the unpaid balance

159 of said note in the Registry of the court.

Thereafter, on behalf of Carl C. Sleek, there was filed a motion upon notice, for leave to intervene, with supporting affidavits and attached petition of intervention, which resulted in

the court's ultimately issuing its order, permitting intervention and directing the deposit of the unpaid balance of said note in the Registry of the court.

Thereafter, on behalf of Dorothy Pace, there was filed a motion upon notice, for leave to intervene, with supporting affidavits and attached petition of intervention, which resulted in the court's ultimately issuing its order, permitting intervention and directing the deposit of the unpaid balance of said note in the Registry of the court.

That thereafter, motion was made on behalf of Erick and Ida C. Flodine to intervene, which said motion to intervene, with supporting affidavits and notice thereof, included some five (5) parcels of real property, and prayed that the conservator be ordered to deposit with the Registry of the court certain amounts previously paid to him.

Thereafter, the defendant, Title Service Company filed its second supplemental cross-claim in interpleader, interpleading a promissory note and deed of trust on certain real property owned by the Sequoia Investment Company, and interplead into the Registry of said court the sum of seven hundred seventeen and 52/100 dollars ($717.52), and prayed that appropriate order of court be made allowing the deposit with the Registry of the court of full reconveyance of the property involved upon receipt by the clerk of the court of appropriate requests for reconveyance from both the purported conservator defendant A. V. Ammann and from the Long Beach Federal Savings and Loan Association.

That thereafter, motion for leave to intervene was made on behalf of Lloyd C. Leedom on notice, with supporting affidavits, together with accompanying complaint in intervention, involving some six (6) parcels of real property, and subsequently an order was made by the court, directing the deposit in the Registry
160 of this court by the purported conservator and the applicant intervenor of the unpaid balance of said note.

That thereafter, motion for leave to intervene was made on behalf of Irvin W. Moore, Jr., on notice, with supporting affidavits, together with accompanying complaint in intervention, involving one (1) parcel of real property, and subsequently an order was made by the court, directing the deposit in the Registry of this court by the purported conservator and the applicant intervenor of the unpaid balance of said note.

Thereafter, on behalf of Mary McGarvey et al., there was filed a motion upon notice, for leave to intervene, with supporting affidavits and attached petition of intervention, which resulted in the court's ultimately issuing its order, permitting intervention, and directing the deposit of the unpaid balance of said note in the Registry of the court.

That hearings on all of the heretofore mentioned pleadings, points, and authorities, documents, interventions, interpleadings, and motions were had and held in the U. S. District Court at Los Angeles, either before the Honorable Peirson M. Hall or before a statutory court convened at Los Angeles, California, pursuant to the provisions of Section 380 (a) of Title 28 of the United States Code.

That, in addition to the above pleadings and proceedings outlined, there was issued on October 1, 1946, by the Honorable Wiley Rutledge, Associate Justice of the United States Supreme Court, in Washington, D. C., prior to the filing of any appeal and upon ex parte application of the defendants John H. Fahey and A. V. Ammann, his order, staying the execution of the judgment of said statutory court and directing

"That if the said directors have already taken possession of the said Long Beach Federal Savings and Loan Association, that the conservator, A. V. Ammann, be placed back in possession forthwith."

That your affiant is informed and believes and upon such information affirms that the Honorable Wiley Rutledge, at the time of issuing his said order affirmatively staying the execution
161 of judgment, indicated to the Washington associate of your client, Mr. Daniel W. O'Donoghue, Jr., that he would permit the making of a motion to himself to vacate his order staying execution of said judgment in the customary manner upon notice and upon appropriate record.

That thereafter, there was prepared by your affiant and filed in the U. S. Supreme Court, at Washington, D. C. upon due notice, a motion to vacate the order staying execution of the decree of the statutory three (3) judge court, which said motion was supported by appropriate affidavits, and points and authorities, comprising some approximately one hundred and four (104) typewritten legal size pages, to which motion the appellants John H. Fahey and A. V. Ammann filed a reply memorandum, with supporting affidavits and extensive points and authorities, comprising some one hundred and eleven (111) pages; and

Thereafter, the matter was duly argued at considerable length by your affiant before the Honorable Wiley Rutledge, Associate Justice of the U. S. Supreme Court, at Washington, D. C., and pursuant to his suggestion, a reply memorandum and affidavits were prepared and filed in response to the appellants' affidavits, which had been filed only forty-eight (48) hours before the said hearing, and which contained new affirmances of incorrect facts. The said rebuttal, affidavits, memorandum, and points and authorities comprised some ninety-two (92) pages.

That the day following the receipt by your affiant of notice from Washington, D. C., that the said motion requesting that the stay

of execution be vacated had been denied, your affiant received in California, an additional statement, and affidavits, consisting of eleven (11) additional pages, filed on behalf of the appellants, which unbeknown to your affiant had been presented to the U. S. Supreme Court without having previously been served upon your affiant and contained new matter which had been filed with the U. S. Supreme Court previous to the decision being rendered.

Many novel problems have arisen in connection with the above litigation, which have required the constant attention of
162 counsel; that your affiant has devoted substantially all of his time to this litigation since the firm of Westover & Smith, of which he is a member, was retained on May 22, 1946, and that from time to time as required, your affiant has been assisted by other counsel who have worked under his supervision and direction in the research of legal questions and the drafting of documents and doing other necessary legal work.

That frequently time has been of the utmost importance in said litigation, and that therefore much time has been spent by your affiant and other counsel on holidays and Sundays and not infrequently, even throughout the night in endeavoring to perform all the necessary legal work involved in this litigation.

That the magnitude of this litigation and the complexity of the numerous and novel legal problems arising therein, have necessitated and required comprehensive and exhaustive research far beyond that involved in the ordinary litigation.

That in addition to the primary question, involving the unconstitutionality of a section of an enactment by Congress, to wit, Section 5 (d) of the Federal Home Owners Loan Act of 1933, as amended, other questions have been involved herein, including such questions as:

The question of jurisdiction of the U. S. District Court located at Los Angeles to hear and determine the matters involved, and

Whether or not the action as brought was properly brought as a class action for and on behalf of all of the shareholder members, and

Whether or not the action as brought came within the provisions of Section 118 of the U. S. Code, Title 28, providing for the bringing of local actions involving questions of liens or clouds upon the title to real or personal property, and whether the acts of the unauthorized purported conservator in dealing with trust deeds and other documents involving title to local real estate, created a lien or cloud upon the title to real or personal property in southern California, and

Could the Federal Home Loan Bank Administration by the enactment of again unconstitutional laws, establish its own
163 courts and administrative tribunals and require the plaintiffs here to exhaust their remedies in such abortive tribunals

before bringing action in the legally constituted courts of the land?

Did the local court lack jurisdiction to hear and determine the matters presented because of the claim that one of the defendants, to wit, John H. Fahey was an indispensable party and could be sued only in the courts in Washington, D. C., and

Were the complaints in interpleader and in the matter of interpleader, filed by the various interpleading defendants within the provisions of subdivision 26 of Section 41 of Title 28 of the U. S. Judicial Code, and

Did the local U. S. District Court at Los Angeles have jurisdiction to hear and determine the entire matter, if it had jurisdiction to hear and determine the matters interplead by the interpleading defendants, and

Was the matter as brought, a proper one to require the convening of the statutory court, composed of three (3) judges, as provided for by Section 380 (a) of Title 28 of the Judicial Code, and

Was the question of repossession of the said Long Beach Federal Savings and Loan Association and its assets, properly before the statutory court composed of three (3) judges to hear and determine and properly to be included in their judgment or decree?

SUMMARY

In summary your affiant respectfully submits that the record as transmitted to the U. S. Supreme Court on appeal, including only such matter as was filed up to and including approximately October 1, 1946, comprised some one thousand three hundred and five (1,305) typewritten pages, excluding all briefs and points and authorities therefrom; that the points and authorities excluded from said record comprised an additional four hundred and five (405) pages, of which the points and authorities filed by your affiant on behalf of the plaintiffs comprised one hundred and eighty-four (184) typewritten pages; that since the taking of said appeal and prior to March 1, 1947, there have been filed in the U. S. District Court at Los Angeles, an additional approximately three hundred and fifty (350) typewritten pages of pleadings, affidavits, and documents, making a total volume of pleadings, documents, affidavits, etc., filed in the U. S. District Court at Los Angeles of approximately two thousand and sixty (2,060) Pages.

164

That petitions or motions for intervention in said action have been filed by approximately fifteen (15) parties, in addition to those originally served and filed, which interpleadings and interventions have dealt with over two hundred (200) parcels of real property, and has involved the payment into the Registry of this court of sums of money of approximately seven hundred

ninety-five thousand, eight hundred nine and 95/100 dollars ($795,809.95) in addition to the fifty thousand dollar ($50,000.00) cashier's check interplead by the defendant Robert H. Wallis.

That in addition to the work and services performed in connection with the matters pending in the U. S. District Court at Los Angeles, there has been filed in the U. S. Supreme Court at Washington, D. C., in addition to the ten (10) copies of typewritten record to be printed, pleadings, affidavits, motions, notices, and documents, comprising a total of three hundred and fourteen (314) additional typewritten pages.

That in connection with the hearings on said motion heretofore had in Washington, D. C., before the Honorable Wiley Rutledge, Associate Justice of the U. S. Supreme Court, it was necessary and your affiant did go to Washington, D. C., and in spite of traveling by plane both ways, it was necessary for your affiant to be away from his office a total of ten (10) days.

That your affiant has had working with him as associate counsel in Washington, D. C., Daniel W. O'Donoghue, Jr., in all matters, particularly since the appeal was taken by the appellants and particularly in connection with the motion and hearings had before the Honorable Wiley Rutledge, Associate Justice of the Supreme Court; that attached to the motion for interim allowance of fees and expenses and marked Exhibit "A" is the
165 statement of legal services rendered by Daniel W. O'Donoghue, Jr., for and on behalf of the plaintiffs herein prior to March 1, 1947, and that the services therein rendered by the said Daniel W. O'Donoghue, Jr., have not been and are not included in the statement of services rendered by the firm of Westover & Smith or by your affiant or attorneys working under his supervision or direction, as the said Daniel W. O'Donoghue, Jr., as associate resident counsel in Washington, D. C., has rendered services in addition to services herein set forth.

That the said Daniel W. O'Donoghue, Jr., associate counsel, has advised your affiant that he has expended close to two hundred (200) hours of time upon this matter, prior to March 1, 1947.

That from the time the firm of Westover & Smith was retained to represent plaintiffs in said action, and prior to March 1, 1947, it has been necessary and there has been a total of more than one thousand four hundred and seventy-one (1,471) hours of attorneys' time consumed; that this is the actual number of hours consumed and makes no allowance for the fact that a great many of these hours, probably more than one-quarter thereof was rendered during Holidays, and Sundays, and during the nighttime, and which might well have been considered justifying the charging of time and a half or double time; that the said figure of one thousand four hundred and seventy one (1,471) hours of Attorneys' time rendered prior to March 1, 1947, in this litigation by the firm of Westover &

Smith and other attorneys working under their supervision or direction represents the actual hours expended.

That your affiant is entirely convinced and satisfied that the bringing of the said action was proper, justified, and absolutely necessary for the preservation of the rights and interest of the shareholder members, and all of them, of the Long Beach Federal Savings and Loan Association, and your affiant respectfully submits that in his judgment the opinion heretofore rendered by the unanimous decision of the Honorable Judges William E. Orr, David W. Ling, and Peirson M. Hall, is correct, and under
166 both the law and the facts, should be affirmed by the U. S. Supreme Court upon appeal.

Wyckoff Westover.
WYCKOFF WESTOVER.

Subscribed and sworn to before me this 21st day of March 1947.

[SEAL] FAY V. DEALEY,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Feb. 24, 1951.

167 CHARLES K. CHAPMAN
Attorney at Law, Ocean Center Bldg.
LONG BEACH, CALIFORNIA
Telephone 619–02

In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421 P. H.

Affidavit of Attorney Charles K. Chapman in support of motion of Long Beach Federal Savings and Loan Association for allowance on account of attorneys' fees

PAUL MALLONEE, C. H. NEWHOUSE, AND WINNIE BUCKLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR, AND ON BEHALF OF, ALL THE MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

168 R. H. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

"SUB NOMINAE"

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANT

vs.

JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, FEDERAL HOME LOAN BANK OF PORTLAND, AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ALL ORGANIZATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES, THIRD PARTY DEFENDANTS

FEDERAL HOME LOAN BANK OF LOS ANGELES, A BODY CORPORATE, THIRD PARTY DEFENDANT AND CROSS-CLAIMANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES
169 KNOWN AND REFERRED TO AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, A BODY CORPORATE, JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, AND PURPORTEDLY SERVING AS FEDERAL HOME LOAN BANK COMMISSIONER, CROSS-DEFENDANTS

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

NOTE. There were 9 or more other Intervenors not herein named.

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

ROBERT H. WALLIS, THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

170 STATE OF CALIFORNIA,
County of Los Angeles, ss:

Charles K. Chapman, being first duly sworn deposes and says: That affiant has been attorney for said Association since May 23, 1946, and has acted as attorney for said Association continuously since that time and is now acting as attorney for said Association. That he is a duly admitted and qualified attorney at law, licensed to practice in all the courts of the State of California, and admitted to practice in the Supreme Court of the United States, and before the United States District Court for the Southern District of California, and has been engaged in the practice of law for more than fifteen years.

That numerous complex and involved legal problems of interpretation of substantive and procedural law were immediately presented in said case. That primarily involved was the question of the validity and constitutionality of the law embodied in the Acts of Congress claimed by defendants Fahey and Ammann to give them authority and power to summarily and arbitrarily, without hearing, notice or statement of causes, to seize and confiscate the assets, property, and business of said Long Beach Federal Savings and Loan Association. That the determination of such questions involved intense research and study of the numerous and extensive regulations proposed to have been adopted by the defendants Fahey and Ammann under the authority of the said Acts of Congress, and further involved the question of the proper court in which to bring action to test the validity and constitutionality of the said Acts of Congress, of said regulations and the seizure by defendants proposing to act under them.

That all amounts involved were most substantial, the assets of said Association having aggregated $26,000,000 and various and numerous related side issues or branches of the main litigation immediately ensued, all of them in multimillion dollar amounts.

171 That it was also imperative to so frame the policies and conduct of the officers and directors of said Association so

as to protect to the utmost the rights of 16,000 shareholder members, more than 8,000 borrowers and the many millions of dollars of real property, bonds, notes and trust deeds, securities, accounts for collection, and other matters all directly and immediately involved and imperiled by the arbitrary and void attempted confiscation by the defendants Fahey and Ammann.

That the defendants Fahey and Ammann were withdrawing and transferring bank balances in the amounts of many millions of dollars standing in the name of said Association, were selling Government Bonds totaling more than $10,000,000, were assigning and transferring notes and deeds of trust aggregating more than $12,000,000. That said institution was immediately involved in a run involving millions of dollars per day in withdrawals by its shareholder members which withdrawals aggregated approximately $10,000,000. That in framing its policy in the litigation which immediately ensued in efforts to restore said management and board of directors to the possession and operation of the said Association, it was necessary to exercise extreme care and judgment at each step in order not to add to the damage and destruction already caused and being continued by the defendants Fahey and Ammann, while at the same time not to waive or relinquish any of the necessary protection of the interests of the said Association and its thousands of shareholder members and borrowers. That questions of constitutional law, interpretation of Acts of Congress, the validity and effect of such constitution, such acts and regulations thereunder, questions of jurisdiction of Federal courts, Federal procedure, California title insurance, customs, negotiable instruments law, general banking law, land conveyance, mutual associations, and the obligations of members therein, Federal corporations created by Acts of Congress, emergency war power litigation and executive orders purportedly adopted
172 thereunder, were all interwoven and reacting upon every decision, plan, pleading, document, and act throughout the entire proceeding.

That instantaneous decisions were required as to matters of the utmost complexity and with far-reaching effect upon the future existence of the seized Association, the welfare and safety of the savings of its 16,000 shareholder members, the titles to the homes of its 8,000 borrowers and the general welfare of all savings institutions throughout the United States. It was readily apparent that the seizure by the defendants Fahey and Ammann was illegal and void both on constitutional and procedural grounds, but the determination of what to do, and more important yet, what to refrain from doing, how to present these issues and to whom, when and where they should be presented were all matters of critical, immediate, urgency requiring immediate decisions with little

opportunity for the slow, long-time consideration so much desired by those giving advice under such circumstances.

Should the issues be presented to the Congressional Investigating Committee? Or to the courts? If to the Courts, to those in Los Angeles, California, or those in Washington, D. C.? Was the action instituted by the shareholder members sufficient to present fully and completely and the Association's case or was supplementary filing of new actions required? Could the Association's case be safely presented in the same action with the shareholders, concurrently or should it be presented separately? Should the Congressional Investigating Committee be asked to give way to the courts or could both proceed concurrently?

Should stop orders be served upon the banks honoring the conservator's withdrawals of Association's funds or must such bank accounts be allowed to be drawn out in payment of the run draining away the resources of the Association?

Could the tens of millions of dollars worth of government bonds and first trust deeds being transferred and sold by the con-
173 servator be recovered by the Association from those to whom the conservator was selling and transferring them?

If so, by what process?

Could the Association safely ask for a definite statement of the pretexts, which defendants Fahey and Ammann claimed were the reasons for such seizure?

Could the Association safely ask for a hearing by the defendants Fahey and Ammann and if granted a hearing, would an impartial tribunal be provided?

If such requests were granted, was there any chance for fair trial or an impartial hearing?

Would such asking deprive the courts of power to redress the great wrongs committed by defendants Fahey and Ammann, and similarly would the failure to ask such hearings, limit or preclude the courts giving relief? What nature of relief could be asked of the courts? By whom and how?

Counsel for a committee of shareholders, could for the trustee, under the $12,000,000 worth of deeds of trust, counsel for the defendants Fahey and Ammann and the United States Attorney's office, counsel for the defendant Robert H. Wallis (who interpleaded a $50,000 check appropriated by said Association for its defense from the attack of Fahey and Ammann) were all making motions, filing pleadings, presenting points, and authorities and requesting various action of the Association, its directors and officers, both in and out of the above entitled court action. Numerous inquiries were being addressed to said officers and directors and to said Association by all those dealing with its assets, properties, and business, was said Association acquiescing in the conduct of its

business by the conservator? Or would all who dealt with the conservator be later called to account for the Association's property?

All these and many other questions arose immediately upon affiant's becoming counsel for said Association and its offi-
174 cers and directors. Many of these questions recurred repeatedly throughout the progress of the litigation of the Congressional Investigation, and during the attempts of the conservator to manage said Association and run its business. All of them required the most careful consideration, innumerable hours of long distance phone calls, personal conferences, research, as well as analyzing, reading and studying of pleadings, documents, points and authorities, regulations, statutes, and laws; all overlapped at various stages. Ordinary office hours were ignored; Sundays, holidays, all night through to daybreak became everyday working occurrences. All pending business of other clients was either sent to other attorneys for immediate attention or those able to wait were deferred. Most new business was rejected. An enumeration of the things actually done details but a tiny fraction of what was considered and temporarily postponed or permanently rejected for reasons having to do with the best welfare of the thousands of innocent shareholders and borrowers whose homes and savings were caught in the meshes and entanglement of Defendants Fahey's and Ammann's unconstitutional and void seizure of the business and assets of the solvent, growing, and prosperous Long Beach Federal Savings and Loan Association.

How best to protect these innocent victims of the abuse of nonexistent power and at the same time to adequately bring the issues before the proper courts and tribunals under the proper methods and with adequate remedies were questions answered only at the cost of incessant day and night, Sunday and holiday effort, and toil. Innumerable questions of policy, advisability, feasibility legality, constitutionality, and effect were met and the best possible solution under the circumstances adopted.

That a mere statement of hours spent would not adequately present the enormous burdens and responsibilities involved in this situation.

That more than nine months have passed during which time said litigation has required constant and incessant con-
175 sideration, planning, and execution. That the efforts were fruitful may be best judged from the results achieved. Despite the necessities of the litigation to determine the validity of the action taken by defendants, the payment to the shareholder members wishing to withdraw their funds was never interrupted. The defendants were restrained on May 27, 1946, from merging or commingling the Long Beach Federal Savings and Loan Associa-

tion as they had merged and destroyed the Federal Home Loan Bank of Los Angeles, a $43,000,000.00 institution seized and merged by them a few weeks prior to the seizure of the Long Beach Federal Savings and Loan Association. That a three judge Federal statutory court was convened and on September 5, 1946, after hearings, arguments, and submission of points and authorities, this court decided that the acts of defendants Fahey and Ammann were unconstitutional and ordered their immediate removal from the premises, business, and assets of said association which they had thus unlawfully seized.

That the matters presented in the points and authorities, pleadings, affidavits, argument, documents, and other matters disclosed by the file, represent only a small portion of the effort and time expended. For every authority cited, many more were read, considered, and rejected. For every affidavit filed, many witnesses were interviewed and only those best informed selected. All pleadings and other documents were drafted and redrafted several times before being finally filed in the form presented to the court. The importance of every item of the litigation to the nation as well as to the community, to the welfare of the many thousands of innocent investors, borrowers, and others involved together with the multi-million total amounts being dealt with called for the utmost and best possible effort and concentration on every matter presented.

During the progress of this case, ordinary office hours were ignored. 1 a. m., 2 a. m., and on many occasions all night through
to dawn were the working hours involved in having ready
176 vital matters urgently required on very short time limits.
Of necessity other clients' matters were referred to other council or rejected entirely if new matters originating after the commencement of this litigation.

That every decision indirectly or directly involved the security and safety of all of the assets of said Association amounting to approximately $26,000,000 of the savings of the citizens of California and in addition, various "side issues" also involved substantial amounts, for example, the original intervention by the Home Investment Company concerned approximately $800,000 in loans secured by first deeds of trust, assets of said Association.

The Association's cross-claim against Fahey and Ammann presented the issues concerning said seizure and confiscation of its $26,000,000 in assets. The third party complaint of the Association against the Federal Home Loan Banks of Los Angeles, San Francisco, and Portland involved $10,000,000 in U. S. Government bonds transferred to and from one or more of said three Federal Home Loan Banks by said defendants Fahey and Ammann and also involved $10,000,000 to $12,000,000 worth of notes

and deeds of trust owned by said Long Beach Federal Savings and Loan Association and pledged or assigned to said Federal Home Loan Bank of Los Angeles by the said defendants Fahey and Ammann. Also involved was the ownership of $360,000 worth of stock in the said Federal Home Loan Bank of Los Angeles purportedly transferred by the defendants Fahey and Ammann to said Federal Home Loan Bank of San Francisco.

Affiant consulted with and advised the officers and directors of said Association concerning their obligations and duties after the purported appointment of the said defendant Ammann as conservator of the said Association and particularly with reference to permitting said Ammann to continue to draw upon the bank accounts of said Association involving millions of dollars of Association's funds and as to whether or not to give stop
177 orders to the banks in which said accounts were situated, and to the banks in which were deposited United States Government bonds of said Association in excess of $10,000,000 in value.

Affiant also advised in connection with the honoring or rejection of requests for reconveyance, demanded of said officers and board of directors by those who had paid and were paying various amounts on notes and deeds of trust, assets of said Association aggregating approximately $12,000,000 in value. Affiant also advised said officers and directors as to requesting a statement from the defendants Fahey and Ammann of the grounds, if any, upon which they purported to seize said Association's assets and business from the said officers and directors. Affiant also advised said directors and officers as to requesting a hearing which at the time of said request said officers rightfully believed would be before an independent and impartial tribunal.

Affiant also carefully considered the Summons and Complaint of Plaintiff Shareholders Committee served upon the Long Beach Federal Savings and Loan Association, advised the officers and directors of said Association of their duties in said action, and affiant also prepared the Answer, Cross-claim and other presentation of the Association's part of the Federal Court litigation instituted and prosecuted by the committee representing the shareholders of said Association, whose savings and money was thus being seized and confiscated by the defendants Fahey and Ammann.

Affiant also supervised interviewing of witnesses and securing of affidavits from the numerous witnesses present at the time of the invasion of the said Association's premises by defendant Ammann with no authority other than his own certification to his own order appointing himself as conservator; affiant also advised said officers and directors as to all of the matters in con-

nection with the intervention, Order to Show Cause, Motion for Leave to Intervene, Order Permitting Deposit of Money, Etc., in connection with the $800,000 intervention of the Home Investment Company seeking to free its titles to 174 homes
178 entangled and clouded by the actions of defendants Fahey and Ammann; said affiant also prepared the Answer to the Cross-claim in Interpleader of Title Service Company, trustee under the 8,000 deeds of trust aggregating $12,000,000 in value of assets of said Long Beach Federal Savings and Loan Association.

Affiant also prepared the Answer of said Long Beach Federal Savings and Loan Association to the Complaint in Intervention of the Home Investment Company concerning the $800,000 of notes and deeds of trust.

Affiant also prepared the Answer to the Cross-claim in Interpleader of the defendant, Robert H. Wallis, who deposited with the clerk of the Federal Court a cashier's check for $50,000, part of an appropriation made by the board of directors of the Long Beach Federal Savings and Loan Association for its defense in the seizure and confiscation by defendants Fahey and Ammann. Affiant also prepared the Third Party Complaint against the Federal Home Loan Banks of Los Angeles, San Francisco and Portland concerning the more than $10,000,000 in Government bonds and the more than $12,000,000 in notes and deeds of trust being sold, pledged, assigned, and transferred by defendants Fahey and Ammann to, from, and through one or more of the said three Federal Home Loan Banks, such transactions aggregating approximately $22,000,000 in total.

Affiant also prepared appropriate Motions of Points and Authorities, and Order of Court Permitting Filing of the said Third Party Complaint, and secured an order of court authorizing the filing and service of said Third Party Complaint.

That defendants Federal Home Loan Bank of Los Angeles and Federal Home Loan Bank of San Francisco have responded to said Third Party Complaint and defendant Federal Home Loan Bank of Los Angeles has filed a Cross-claim against defendants Fahey and Ammann and against Federal Home Loan Banks of San Francisco and Portland, setting forth the
179 circumstances of the seizure, merger, and liquidation of the Federal Home Loan Bank of Los Angeles, that all of said matters have been carefully considered and studied by affiant as to their effect upon the interests of the Long Beach Federal Savings and Loan Association, both in this pending litigation and generally.

That Federal Home Loan Bank of San Francisco has filed numerous Motions, in connection with the said Third Party Com-

plaint of the Long Beach Federal Savings and Loan Association and in connection with the said Cross-claim of Federal Home Loan Bank of Los Angeles.

That affiant carefully considered the Notice of Motion, Points and Authorities, Affidavits, and other matters in support of the motions of plaintiffs for Temporary Restraining Orders and for Preliminary Injunctions to Restrain the Merger and Destruction of the said Long Beach Federal Savings and Loan Association with other institutions and also carefully considered and studied Motions, Affidavits, Points and Authorities, etc., filed by plaintiffs and defendant Title Service Company for Temporary Restraining Order and Preliminary Injunction, presenting the Interference with the jurisdiction of the United States District Court by defendants Fahey and Ammann by their attempted administrative hearing and affiant presented to the Honorable Three Judge Statutory Court at the time of hearing, the Association's position upon said Motions and particularly the effect upon said Association of a summary merger of it with other institutions.

Affiant also carefully considered and studied the Motions, separately made at different times by defendants Fahey and Ammann seeking to quash service of process upon them, seeking to dismiss plaintiff's original Complaint, defendant Title Service Company's Cross-claim in Interpleader, defendant Robert H. Wallis' Cross-claim in Interpleader, and the Answer and Cross-claim of defendant Long Beach Federal Savings and Loan
179 Association together with the innumerable affidavits, statements in support of motions, Points and Authorities, photostatic exhibits, and other documents filed by said defendants Fahey and Ammann in support of their said various motions.

That in meeting the motions of said defendants Fahey and Ammann affiant reviewed and analyzed 635 typewritten pages of transcript of the testimony of Fahey and his subordinates before the Congressional Investigating Committee investigating the actions of Fahey and Ammann in their seizure and liquidation of the defendant Long Beach Federal Savings and Loan Association and of the Federal Home Loan Bank of Los Angeles.

That affiant carefully studied the opinion of the Honorable Three Judge Statutory Court holding the Act of Congress under which defendants Fahey and Ammann purported to act unconstitutional and carefully considered the findings of fact, conclusions of law, and judgment of said Honorable Court and defendant Ammann filed lengthy objections to the findings, conclusions of law, and judgment, filed a request for stay of execution, numerous points and authorities supporting his objections and requests and affiant carefully considered and studied all of said objections and

prepared on behalf of said Association reply to said objections, supported by points and authorities, affidavits, etc. That pursuant to said judgment, the U. S. Marshal undertook to restore possession of said association and its assets to the officers and directors of said Long Beach Federal Savings and Loan Association and affiant advised said officers and directors of said Association concerning the various possibilities arising from possible action of defendant Ammann and the transfers from Ammann to the said officers and directors of the extremely voluminous books, records, files, securities, documents, bank accounts, cash, and other assets. That said partially commenced transfer by said defendants Fahey and Ammann to the said officers consumed all of the hours from close of business, three o'clock P. M. throughout the night
181 and part of the succeeding business day and was still incomplete and only partially commenced when defendants Fahey and Ammann presented the said officers an order issued by Honorable Wiley P. Rutledge, Associate Justice of the United States Supreme Court, requiring the partially commenced surrender of assets by defendant Ammann to cease and if the directors had already taken possession, the conservator be put back into possession. That numerous orders, receipts, assignments, and other documents were of necessity extemporaneously prepared, dictated, approved, and considered during the time of said commenced transfer of possession and after the service of said order in relinquishing the partial possession not yet acquired by said Association. That all of said matters were of extreme importance and difficulty as the said association premises were swarming with deputy examiners, deputy conservators and other subordinates of the defendants Fahey and Ammann, many of whom were making suggestions and objections to all phases of said transfer. That all conferences concerning said matters had from 6 to 15 participants all discussing and suggesting concerning the measures being considered. That defendants Fahey and Ammann filed the various documents concerning their appeal to the United States Supreme Court involving approximately nineteen claims of error and requiring a careful study and consideration by affiant. That many other interventions have been made by numerous borrowers of said association seeking to obtain a valid and effective release of their property by payment of amounts due upon their deeds of trust into the Court Registry. That all of such interventions have been served upon, considered by and received the careful attention of the affiant and numerous conferences have been necessary with certain of the counsel for intervenors and with other counsel in the case. That affidavits by the officers, directors and employees of said Long Beach Federal Savings and Loan Association have been prepared and filed on repeated occasions through-

out progress of said litigation, many of such affidavits being from 20 to 40 pages in length. Many of said affidavits
182 have been prepared by affiant and all of the same have received his careful study and consideration before being sworn to by the said officers, directors, and employees of said Long Beach Federal Savings and Loan Association. That much effort has been expended by affiant in preparation for the briefing, argument, and preparation of the said association's part of the appeal taken by defendants Fahey and Ammann to the United States Supreme Court. Much time has been consumed in study of designation of portions of the record to be printed and to be omitted and in conferences with other counsel for other parties concerning the said record.

Affiant also consulted and advised with counsel for other parties to the litigation as to the policy, attitude, and actions which would be taken by the said officers and board of directors in connection with all of the complex and intricate Motions, Pleadings, Affidavits, Resolutions, and other activities of said counsel for said various other parties. Affiant also advised said directors and officers as to the formulation of the policies and replies to be made by said officers and directors to inquiries constantly received by them from other financial institutions contemplating, or about to have dealings with various portions of the assets, property, money, loans, bonds, securities, and other matters concerning said Long Beach Federal Savings and Loan Association.

Affiant also advised concerning the documents, evidence and other matters to be produced at Washington, D. C., at the hearing of the Congressional Committee investigating the acts of defendants Fahey and Ammann in their seizure and confiscation of the Federal Home Loan Bank of Los Angeles and the Long Beach Federal Savings and Loan Association.

Affiant also advised said directors and officers as to what, if any, opposition, cooperation, or nonactivity was proper for said Association and its board of directors and officers in con-
183 nection with all pleadings, affidavits, motions, statements, points and authorities, and all other matters appearing in the file of the above entitled Federal Court action on the part of all parties thereto.

That an exact and detailed, itemized statement of the activities of said affiant is not practical as many matters overlapped, several were considered at the same time and various matters apparently once disposed of were recalled for additional consideration upon each new development by the various parties litigant, upon each new ruling, order, or preliminary restraining order, judgment, appeals, application for stays and denials thereof, and other matters too numerous for detailed mention.

That despite the enormous legal difficulties involved in so doing, the Association's side of the unconstitutional and void seizure of its assets and business was presented both to the Congressional Investigating Committee and to the Three Judge Statutory Federal Court of Los Angeles without preventing the honoring, as presented, of every withdrawal demand by its shareholder members who withdrew over $10,000,000, or nearly one-half of the total deposits of said seized Long Beach Federal Savings and Loan Association. That both the Congressional Investigating Committee and the Three Judge Statutory Federal Court of Los Angeles have held the seizure invalid. That the Congressional Investigating Committee recommended the removal of the defendant as conservator. That the Three Judge Statutory Federal Court ordered such removal. That the matter is now pending upon appeal before the Supreme Court of the United States. That the unconstitutionality of the Act under which defendants Fahey and Ammann purported to seize the defendant Long Beach Federal Savings and Loan Association has been determined by the Three Judge Statutory Federal Court at Los Angeles and awaits final determination before the United States Supreme Court in Washington, D. C. That insofar as was possible under the circumstances what remains of the
184 Association and its assets have been preserved awaiting the day of their return to those, the officers and directors, who built up said Association from $7,500 at the start of its existence in 1934 to approximately $26,000,000 at the time of its seizure by defendants Fahey and Ammann.

That affiant has spent approximately 1,415 hours up to the end of February 1947, of his own time, omitting therefrom all secretarial, clerical, and other assistants' time. That said hours have been made available at the cost of rejection of new matters offered affiant by other clients involving many thousands of dollars of possible income.

Wherefore, affiant prays that this Honorable Court fix and determine a reasonable compensation for the services rendered said Association commensurate with the value to said Association of the services it thus received.

Further affiant sayeth naught.

Charles K. Chapman,
CHARLES K. CHAPMAN,
Attorney for defendant Long Beach Federal Savings and Loan Association.

Subscribed and sworn to before me this 21st day of March 1947.

MARIE R. ECKLES,
Notary Public in and for said County and State.

My commission expires August 13, 1947.

185 THOMAS AND WALLACE
Attorneys for Title Service Company
602 Jergins Trust Bldg.
LONG BEACH 2, CALIFORNIA
Telephone 727-61

In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421-P H

Affidavit of H. O. Wallace in support of motion for allowance on account of attorneys' fees by Title Service Company

PAUL MALLONEE, C. H. NEWHOUSE, AND WINNIE BUCKLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR, AND ON BEHALF OF, ALL THE MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT

186 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

R. H. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER

"SUB NOMINAE"

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANT

vs.

JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANT AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, FEDERAL HOME LOAN BANK OF PORTLAND, AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ALL ORGANIZATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES, THIRD PARTY DEFENDANTS

187 FEDERAL HOME LOAN BANK OF LOS ANGELES, A BODY CORPORATE, THIRD FARTY DEFENDANT AND CROSS-CLAIMANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES KNOWN AND REFERRED TO AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, A BODY CORPORATE, JOHN H. FAHEY, INDIVIDUALLY, AND JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, AND PURPORTEDLY SERVING AS FEDERAL HOME LOAN BANK COMMISSIONER, CROSS-DEFENDANTS

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

NOTE. There were 9 or more other Intervenors not herein named.

vs.

PAUL MALLONEE, ET AL., AND JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

ROBERT H. WALLIS, THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

188 TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

STATE OF CALIFORNIA,

County of Los Angeles, ss:

H. O. Wallace, being first duly sworn, deposes and says:

That he is an attorney at law, duly licensed to practice his profession by the Supreme Court of the State of California and in all of the courts in the State of California. That he is a member of the Bar of the State of California, the Bar of the Federal Courts

in the Southern District of California and that he is a member of the Bar of the Supreme Court of the United States of America.

That he is a member of the firm of Thomas and Wallace composed of Edison Thomas and of affiant, and that they maintain an office for the general practice of law at 602 Jergins Trust Building, Long Beach, California.

That for many years last past, save and except the three-year period during which affiant was on active duty as an officer in the United States Navy, he had been counsel for Title Service Company. That said Title Service Company, a corporation, organized and existing under and by virtue of the laws of the State of California was the named trustee under deeds of trust wherein the Long Beach Federal Savings and Loan Association was the beneficiary. That on May 20, 1946, said Association was seized by the Defendant A. V. Ammann, one of the defendants in the above entitled and numbered action, who claimed to be acting pursuant to a purported order issued by the Federal Home Loan Bank Administration. That at the time of said seizure the num-
189 ber of trust deeds outstanding on which Title Service Company was the named trustee and on which said Association was the beneficiary totalled approximately 8,000 and that the same secured the payment of promissory notes of a total approximate value of $12,000,000.00. That following said seizure affiant was consulted by Title Service Company with reference to its duties, liabilities and obligations under said deeds of trust and how the same would be affected by such seizure and the firm of which affiant is a member was then retained to take any such steps as might be deemed necessary and to counsel and advise Title Service Company as to any actions to be taken by it as a consequence of said seizure. That ever since said time affiant's law firm has been, and still is, counsel for Title Service Company, and that affiant has had the exclusive handling of such matters for his firm. That all of said trust deeds related to real property located in Southern California, the great bulk of which is located in Los Angeles County.

That after May 20, 1946, the said A. V. Ammann presented to Title Service Company, as trustee, 174 deeds of trust and the promissory notes for which they were security aggregating approximately $825,000.00 in value and which notes had been marked "cancelled," together with Requests for Reconveyances of said deeds of trust, all executed by said A. V. Ammann in his purported capacity as conservator for said Long Beach Federal Savings and Loan Association. That the said A. V. Ammann had not at that time, and has not since, presented any evidence of his claimed authority as Conservator to Title Service Company. That Title Service Company was advised by the Long Beach

Federal Savings and Loan Association that the authority of the said A. V. Ammann was not recognized and that the same was then being challenged in an action filed in the Federal District Court of the United States by a committee of shareholders in said
190 Association, said action being under the above entitled and numbered proceeding. Title Service Company was also advised by said Association that if it complied with any requests for reconveyance issued by said A. V. Ammann, as such purported conservator, that it would be held liable by said Association for any damages which might be suffered.

That at about the same time Title Service Company was served with an alias summons issued in the above entitled and numbered action, wherein it was sued as "John Doe I," a defendant. That affiant thereupon researched the question of interpleader in Federal Courts and advised Title Service Company that it could only relieve itself from the vexations of possible multiple liability and litigation by interpleading the documents which had come into its hands and by depositing the same in the Registry of the Federal court. Affiant also further advised his client that in view of the large number of parcels of real property on which it was named as the trustee under deeds of trust wherein said Association was the beneficiary that further litigation would most probably ensue and that it should relieve itself from liability by also filing a Bill in the Nature of Interpleader referring to all of such other properties and requiring the said Association and the purported conservator and any other interested parties to litigate the issues relating thereto between themselves.

That as a result of the advice given, as above set forth, Title Service Company authorized affiant to, and he did, enter an appearance in said litigation on behalf of Title Service Company and he did prepare and file an Answer and Cross-Claim in Interpleader. That said Answer and Cross-Claim was filed on the 4th day of June, 1946.

That by reason of the fact that the Defendant John H. Fahey was a nonresident of the State of California, to wit, a resident of the State of Massachusetts and had his principal place of business
191 in Washington, D. C., affiant prepared the necessary affidavits and order for service outside the State of California, obtained the requisite order for service from the Court and delivered the same to the Marshal of the Federal District Court for service upon the necessary persons in the local jurisdiction and for forwarding for service upon the Defendant Fahey outside the state. Affiant also procured the issuance of alias summonses and directed the proper service thereof.

That at the time of filing the Answer and Cross-Claim in Interpleader, affiant deposited the 174 trust deeds, promissory notes, and requests for reconveyances, above described, with the Clerk of the Registry of the Court and obtained his detailed receipt for the same.

That on the 12th day of June 1946, one Robert H. Wallis filed as Answer and Cross-Claim in Interpleader as to a check for $50,000.00 which had been delivered to him pursuant to a resolution authorizing the same made by the Long Beach Federal Savings and Loan Association, as attorneys' fees. That affiant gave considerable consideration to the effect of such action and advised his client that it need take no action in regard thereto.

That by reason of the fact that the original complaint filed in this action prayed for injunctive relief and challenged the constitutionality of an Act of Congress, to wit: the Home Owners' Loan Act of 1933, as amended, it required a trial by a statutory court composed of three judges pursuant to the provisions of Title 28, Section 380A of the Judicial Code. In anticipation of such trial a motion was made by the Long Beach Federal Savings and Loan Association for the taking of oral testimony at such hearing, in which motion the plaintiffs joined. It was the opinion of affiant that the taking of testimony in such manner would be desirable and by reason of the fact that the granting of such motion would redound to the benefit of Title Service Company no objection was made to it.

That there was filed on June 14, 1946, a Notice of Motion
192 to Dismiss, with supporting documents, on behalf of the Defendant A. V. Ammann. Said motion was directed to the Plaintiffs and to the Cross-Claimants in Interpleader. In response to this motion it was necessary that affiant, and he did, prepare and file on behalf of Title Service Company a Statement and Points and Authorities in Opposition to the Motion to Dismiss. This document required considerable additional research in connection with its preparation. It was filed on June 28, 1946.

That the Defendant Fahey, in an apparent attempt to overcome the defect in the portion of the Home Owners' Loan Act of 1933, Section 5 (d) in that [redacted] for due process, or any process or opportunity to be heard prior to the appointment of a conservator, issued an order for an administrative hearing at which hearing any party interested might appear and give testimony to show why a conservator should not have been appointed. That such hearing was to be had before an officer appointed by said Fahey who was to record such testimony and forward the same to the said Fahey for consideration by him. That no official notice of the holding of such hearing ever was served upon Title Service Company but that information of its

being ordered was obtained. That affiant was consulted as to his opinion as to the effect of such an hearing and that he advised that, in his opinion, such a hearing would be an idle act and that the same could only result in further clouding titles to the real estate of which Title Service Company was the trustee, as hereinabove set forth in detail, by reason of the fact that a nonjudicial officer would, in effect, be passing upon the validity of his own act in appointing a conservator who was assuming the prerogative of issuing requests for reconveyances of deeds of trust wherein the Long Beach Federal Savings and Loan Association was named as beneficiary. That in order to prevent such hearing affiant prepared, served, and filed a Notice of Motion to Restrain the
193 Holding of Administrative Hearing, Motion for same, Affidavit in Support of same and Memorandum of Points and Authorities in Support of same. That said documents were filed on June 28, 1946. That by reason of the fact that said motion sought to restrain by injunctive relief and that the act sought to be restrained was one which was provided for by a regulation adopted under a section of an Act of Congress which was allegedly unconstitutional, the hearing thereon would also have to be heard by a statutory court of three judges pursuant to Section 380A of the Judicial Code. The question in such proceeding was almost unique in that it involved questions of jurisdiction as to an interpleader, constitutionality, the duties of a trustee under a deed of trust wherein the responsibility of defending title to real property was made a mandate to the trustee and the rights of the trustors to approximately 8,000 parcels of realty was involved.

My reason of the arbitrary and precipitate acts of the Defendants Fahey and Ammann in transferring many millions of dollars worth of deeds of trust without authority for so doing, it became apparent that additional notice of record of the conflicting claims of said Defendants and the Long Beach Federal Savings and Loan Association be made known. That transferees and recipients had no way of knowing of his lack of authority. To protect rightful owners and innocent recipients Lis Fendens was necessary. Therefore, counsel prepared a Notice of Fendency of Action, as provided in the Code of Civil Procedure of the State of California, and recorded the same on June 27, 1946, in the office of the County Recorder of Los Angeles County, California. That said Lis Fendens was in single spaced typing in elite type and was 261 pages in length.

That the Plaintiffs in said action also filed their Motion to Restrain the Holding of an Administrative Hearing. That the positions of the Plaintiffs and the Title Service Company were entirely different in such proceeding but that it was for the best interests

of both that the same be successful and that said hearing
194 be restrained. Therefore, affiant prepared and filed a Statement in Reply to the Notice of Motion filed by the Plaintiffs setting forth its position and supporting the Plaintiffs' motion.

That reference has heretofore been made *made* to the deposit in interpleader by affiant, on behalf of Title Service Company, of 174 promissory notes, deeds of trust and requests for reconveyances. That all of said deeds of trust and promissory notes had been executed by Home Investment Company of Long Beach, a corporation. That said Home Investment Company, etc., filed a Notice of Motion to be Allowed to Intervene and the necessary documents in support thereof, including a Complaint in Intervention wherein and whereby leave was sought to deposit the money due on said promissory notes in the Registry of the Court and to obtain orders requiring the issuance of reconveyances by Title Service Company. That this proceeding required considerable research and conference between counsel. By reason of the fact that custom and usage in California require the issuance of policies of title insurance in order to perfect a marketable title, numerous conferences were required with the legal advisers and officers of the leading title insurance company in Southern California by affiant. After such research and consultation affiant, on behalf of Title Service Company, prepared, served, and filed an answer to Complaint in Intervention. Thereafter, and on the 12th day of July 1946, the matter came on for hearing and the Court made its order allowing the deposit of money in Court by said intervenor, and directing the issuance of reconveyances by Title Service Company, their deposit in Court and the issuance thereof to the intervenor by the Clerk. It was necessary for counsel to, and he did, aid in the preparation of such Order for the protection of Title Service Company, as trustee, and to insure that the money so deposited was held in lieu of the title to the real property interplead.

That the hearing on the Plaintiff's motion for Injunc-
195 tion re Merger and the hearings on the Motions to Restrain the Holding of Administrative hearing filed by the Plaintiffs and Title Service Company, respectively, had been continued from time to time and were finally set down for hearing on July 15, 1946.

That said hearings were set before Honorable William E. Orr, Circuit Judge, Honorable Dave W. Ling, District Judge of Arizona, and the Honorable Peirson M. Hall, District Judge of the Southern District of California. That prior to such hearing a further Motion to Dismiss had been filed on behalf of the Defendant Ammann; and a Motion to Dismiss or Quash Return of Service of Summons had been made by the Defendant Fahey.

It was deemed necessary, and counsel did, prepare, serve, and file a Memorandum of Points and Authorities in Opposition to the Motion to Dismiss filed on behalf of the Defendant Ammann and a Memorandum of Points and Authorities in Opposition to the Motion to Dismiss or Quash filed by the Defendant Fahey. In their efforts to evade the jurisdiction of the Federal District Court these defendants proposed highly unique hypothesis such as that deeds of trust to real property were not "property" in the sense that such term is used in the federal interpleader statute, that the amending of the preamble portion of Section 41 of Title 28 of the Judicial Code with reference to jurisdiction did not result in an amendment to the entire section. All of these spurious arguments required a vast amount of research to insure that the answers interposed were sufficient. That such answers were sufficient is evidenced by the holding of the statutory court as hereinafter set forth.

On July 15, 1946, the three judge statutory was convened. This court was comprised of the one circuit judge and two district judges above named.

At the hearing, which continued through July 16, 1946, all questions were argued at length by counsel for all parties. Many questions were directed to counsel by the Court and all
196 matters were fully presented to the Court. At the conclusion of the presentation the Court requested that all parties submit a compilation of points and authorities going to the question of constitutionality under discussion and announced that the matter would stand submitted upon the filing thereof.

That in consequence of the request for a preparation and filing of a compilation of points and authorities, by the Court, as above set forth, affiant expanded his research even beyond that theretofore done and prepared such compilation which amounted to a condensation of the most pertinent case law on the subject which he was able to assemble. In order to do this it was necessary to exhaustively read all cases pertinent to the matters at issue, sift the same to collect those most nearly in point and to finally assemble and digest those cases chosen for presentation to the Court. Since only five (5) days had been allowed for this work it resulted in working far into the night all through the period.

From the time that Title Service Company was presented with the original 174 deeds of trust, promissory notes, and requests for reconveyances by the Defendant Ammann, which were interplead as hereinabove set forth, and notwithstanding his actual and constructive knowledge that Title Service Company could not issue such reconveyances upon the strength of requests therefor issued by him, the Defendant Ammann continued to accept full payment of promissory notes secured by deeds of trust and gave requests

for reconveyances. Many of these were presented by the trustors and payers to Title Service Company, or to your affiant, or to both, by such persons who demanded reconveyances of their deeds of trust. Each case required a detailed explanation to such person as to the reason why such requests could not be complied with. Certain of such persons had left or sent their documents to Title Service Company with such demands. In order to relieve Title Service Company from responsibility for some 25 such sets
197 of documents affiant prepared, served, and filed a Notice of Motion to be Allowed to file a Supplemental Interpleader, with the necessary supporting documents consisting of a formal motion, proposed supplemental cross-claim in interpleader, and affidavits in support thereof. After several continuances this motion was granted and the actual 25 trust deeds, promissory notes, and requests for reconveyance were deposited with the Clerk of the Registry.

That on September 5, 1946, the Honorable Three Judge Statutory Court filed its opinion on the matters submitted after its hearing held on July 15 and 16, 1946. The Court, speaking through the Honorable William E. Orr, held that any authority of the Defendants Fahey and Ammann must be "bottomed" on Section 5 (d) of the Home Owners' Loan Act of 1933 and that said section was unconstitutional and void as attempting to delegate legislative authority to the Federal Home Loan Bank Board created under the Federal Home Loan Bank Act. The Court ordered that judgment be entered in accordance its opinion.

Upon the rendition and filing of the opinion of the Court, as hereinabove set forth, it was incumbent upon counsel to prepare the necessary Fidings of Fact, Conclusions of Law, and Judgment. In order that such documents adequately cover all of the voluminous ramifications of the questions involved, grant the necessary relief to all parties praying for the same and dispose of all issues raised it was necessary that they be drawn with great particularity and that they be adequately supported with authority. In order to achieve this difficult task affiant worked diligently and in long conferences with counsel for the plaintiffs for the defendant Association and the cross-claimant Wallis. As evidence of the success of their efforts the Findings of Fact, Conclusions of Law, and Judgment, as signed by the Court and entered by the Clerk was varied by the addition of only one word.

After the hearing in July and pending the filing of the
198 opinion by the Court, the Defendant Ammann continued with the administration of the affairs of the Long Beach Federal Savings and Loan Association. In so doing many violations of good business practice were committed which resulted in harm to the trustors under deeds of trust and which undermined

the position of Title Service Company as trustee. Such acts, as they affected the trustee, consisted of the continued acceptance of full payment of promissory notes secured by deeds of trust and the giving of requests for reconveyances, well knowing that the same could not be honored and yet not so advising the payors, mutilation of notes and trust deeds in lieu of cancellations thereof, stating to customers that failure to give reconveyances was of the choosing of Title Service Company, advising persons that Title Service Company had recorded a Notice of Pendency of Action in order to becloud land titles, and other things. In order to try to put an end to such practices pending the signing and entry of the judgment, and after the rendition of the opinion, affiant concurred in and participated in the hearing of a Motion for Temporary Restraining Order in re Interference with the Operation of the Long Beach Federal Savings and Loan Association and submitted affidavits in support thereof. This motion was, by the Court, denied. However, it is believed that the presentation of the factual matter involved demonstrated to the Court the need for an early entry of judgment. That affiant participated in the preparation of many of the affidavits presented to the Court at such hearing.

That following the preparation of the Findings of Fact, Conclusions of Law and Judgment, as above set forth, copies of the same were served upon counsel for the Defendants Fahey and Ammann. That after such service a voluminous set of objections thereto were served and filed by counsel for such defendants. That it was deemed highly necessary that a response thereto be filed on behalf of Title Service Company and that affiant did prepare, serve, and file such response.

199 Also, prior to the rendition of judgment, counsel for the Defendants Fahey and Ammann, prematurely, filed a Motion for Stay of Execution. Therefore, affiant prepared, served, and filed a response to such request for a stay of execution. As has been heretofore noted, the judgment was signed in the form in which it was prepared, subject to the addition of but a single word. The stay of execution was denied contemporaneously with the entry of judgment.

As though affiant were not sufficiently occupied during this immediate period, on September 25, 1946, there was filed on behalf of one Michael J. O'Rourke a Notice of Motion for Leave to Intervene, Motion for same, Affidavit in Support of same and a proposed Complaint in Intervention, whereby it was sought to intervene in the action, obtain leave of court to deposit in court the money remaining due on a promissory note made by the intervenor in favor of the Long Beach Federal Savings and Loan Association secured by a deed of trust, require the surrender into court by the Defendant Ammann of such note and deed of trust

and his request for reconveyance, require the delivery of a request for reconveyance from the officers of said Association to be deposited in court and require Title Service Company, as trustee, to deposit its reconveyance in court and require the clerk, upon the happening of all of the foregoing conditions to deliver to the intervenor said reconveyance. Said motion was noticed for hearing on October 7, 1946. Prior to that date affiant had numerous conferences with all parties involved looking to expediting the matter as it was realized that this proceeding was probably the forerunner of many similar proceedings. After much painstaking and time-consuming conferences, both by telephone and in person, the requisite forms of documents were worked out and the motion was granted.

That the judgment in the above entitled and numbered matter in favor of the plaintiffs and against the Defendants Fahey and Ammann requiring that they immediately relinquish the
200 control of the Long Beach Federal Savings and Loan Association to its officers and directors and further adjudging that said defendants had no right or interest in or to any of the interplead property was entered on September 30, 1946, and that a Writ of Assistance was issued concurrently therewith. That on the night of September 30, 1946, said judgment and writ were, by a deputy United States Marshal, served on the Defendant Ammann who did partially and reluctantly comply therewith. That affiant, on behalf of Title Service Company, did assist in the retaking of the possession of said Association and in the checking of its assets insofar as the same affected Title Service Company. That such checking was made very difficult by reason of the act that various persons, examiners for the Federal Home Loan Bank Administration, declined to make available various records, particularly the deeds of trust, on the pretext that they were under orders to commence a new examination of said Association whenever the Defendant Ammann should relinquish control thereof. That thereafter, and on the following day, to wit: October 1, 1946, at Washington, D. C., an application was made to Mr. Justice Rutledge of the Supreme Court of the United States, ex parte, not only for a stay of execution, but for a mandatory order restoring the Defendant Ammann to the possession and control of said Association. This application was granted and executed on October 2, 1946, and that between September 30 and October 2, 1946, Title Service Company never did gain access to its files in the possession of said Ammann or said examiners. That in granting said application Mr. Justice Rutledge did state that he would, at a later date, entertain a motion to rescind his action.

That thereafter affiant, in cooperation with counsel for the other parties to said action, other than the Defendants Fahey and Ammann, prepared a voluminous affidavit in support of a motion to set aside said stay of execution and restoration of the Conservator and in the preparation of points and authorities in support of said motion. In addition to the principal affidavit, executed
201 by the Plaintiff Mallonee, there were numerous other affidavits filed, most of which were prepared by affiant, many from trustors under deeds of trust wherein Title Service Company was the trustee. The motion and supporting documents were served on the office of the Solicitor General in Washington, D. C., and were answered by a compendium of affidavits and points and authorities. The hearing was had before Mr. Justice Rutledge and was attended by Wyckoff Westover, Esq., of counsel for the plaintiffs, who presented the matter on behalf of all counsel. At such hearing Mr. Justice Rutledge was apparently sufficiently impressed with the gravity of the question involved that he gave all parties appellee an additional ten days within which to file rebuttal documents and stated that he was going to take up the matter with the entire Court, in conference. The ten-day period allowed was decreased by travel time from Washington by counsel above named and by the time necessary to forward the rebuttal documents to Washington, D. C., within the time allowed. Affiant spent a great deal of time, including many nights, in aiding in the preparation of such rebuttal documents. Notwithstanding these efforts the motion to set aside was denied.

Following the entry of the judgment in the District Court this affiant prepared, served, and filed a Memorandum of Costs and Disbursements on behalf of Title Service Company in the District Court.

Within a very few days after the entry of the judgment in the District Court the Defendants Fahey and Ammann filed their Notice of Appeal, had the appeal allowed and served and filed the other documents necessary to perfect their appeal to the Supreme Court of the United States, including their Praecipe for Record on Appeal and their Specifications of Error. Upon receipt of these documents affiant checked the same in detail to ascertain the basis for the appeal and to determine what further documents were reasonably necessary to the record on appeal to present a complete record to the Supreme Court. Such checking was
202 in infinite detail and resulted in affiant, as counsel for Title Service Company, joining with counsel for the other appellees in two additional designations of record on appeal.

In connection with the preparation of the necessary documents for presentation to Mr. Justice Rutledge, as above set forth, it was deemed necessary to present a complete record of proceedings in the District Court. In compiling the same it was prepared in a sufficient number of copies to provide copies for all justices of the Supreme Court. This affiant, personally, undertook the supervision of the preparation of this record and the insuring of its accuracy. This record consists of 942 typewritten pages, plus an additional 363 typewritten pages of the reporter's transcript.

Prior to the hearing of the case in the District Court the Defendants Fahey and Ammann had sought and obtained an extension of time until after the entry of judgment in which to file further pleadings in the case. After the entry of judgment, and on or about the 21st of October 1946, the following documents were served on affiant, as counsel for Title Service Company, and filed in the District Court:

Separate Answer of Defendant Ammann to Cross-Claim in Interpleader of Title Service Company.

Separate Answer of A. V. Ammann:

Motion to Dismiss or in Lieu thereof to Quash Return of Service of Summons by John H. Fahey (Interpleader of Wallis).

Motion to Dismiss by John H. Fahey (Complaint).

Separate Answer of Ammann to Cross-Claim in Interpleader of Defendant Robert H. Wallis.

Motion to Strike and Motion to Dismiss by John H. Fahey (Answer and Cross-Claim of Long Beach Federal Savings and Loan Association).

Motion to Strike and Motion to Dismiss by A. V. Ammann (Answer and Cross-claim of Long Beach Federal Savings and Loan Association).

202 Motion to Dismiss or in Lieu thereof to Quash Return of Service of Summons by John H. Fahey (Cross-Claim of Title Service Company).

Notice of Motions (All of the foregoing).

Since an affirmance of the judgment of the District Court by the Supreme Court would render all of the questions raised by the hereinabove-described pleading moot, affiant joined with counsel for the other appellees in obtaining an order extending time in which to plead to all of said pleadings until after the determination of the appeal.

That subsequent to the seizure of the Long Beach Federal Savings and Loan Association by the Defendant Ammann, Sequoia Investment Corporation paid to the said Ammann the balance due on a promissory note secured by a deed of trust there-

tofore executed by Lamont V. Stewart and Henrietta F. Stewart, said note and deed of trust having theretofore been assumed by said Sequoia Investment Corporation. That the said Ammann had delivered to said corporation a request for a reconveyance executed by himself as the purported conservator for said Association. That said corporation advised Title Service Company that it required an immediate reconveyance and preferred to again pay the balance due on said note in order to obtain an immediate reconveyance. Upon this information being transmitted to said Association, Title Service Company was authorized to accept such payment and deposit the same in the Registry of the Federal District Court, in interpleader, upon obtaining a court order so to do, and to issue and deliver its reconveyance to said corporation. That in pursuance of such instructions affiant prepared and filed a Second Supplemental Cross-Claim in Interpleader with its supporting documents and obtained a court order authorizing it to deposit said money, amounting to $683.84 balance on note, $31.18 interest and $2.50 reconveyance fee, in interpleader, and to deposit the original promissory note, trust
203 deed, and request for reconveyance with the Clerk who was ordered to cancel said note, and directing Title Service Company to execute and deliver such reconveyance. Said order was fully complied with by Title Service Company.

That in addition to the single intervention made by the Home Investment Company of Long Beach, as above set forth, there have also been filed a total of eleven (11) other proceedings in intervention covering a total of twenty-five (25) parcels of real property. Each intervention proceeding has required this affiant to, and he has, checked into the matters of record titles of the parties seeking to intervene, a checking of the amounts due on each of the promissory notes involved, a checking of amounts claimed to have been paid to the Defendant Ammann subsequent to May 20, 1946, and how such money was applied, i. e., what portion was applied on principal, what portion on interest, and what portion was impounded for the payment of taxes, interest, insurance, etc. Each matter has also required a checking of all pleadings filed, numerous conferences with the attorneys representing the intervening litigants and the need for conferring with each of such counsel as to the problems involved. The proceedings in intervention have also required that counsel confer with the attorneys for the other parties in interest and with the legal advisors of the Title Insurance and Trust Company. As a result of the experiences gained in these intervention proceedings a method of procedure has been worked out by the Court, counsel,

and the Title Insurance and Trust Company, which, if followed, will result in intervenors obtaining policies of title insurance for their property and a marketable title thereto. Almost every intervention proceeding has had problems unique unto itself. In some of these proceedings the intervenors had paid nothing since May 20, 1946, in others they had paid a portion of the payments due since May 20, 1946, and in still others the full amount of the note had been paid to the Defendant Ammann. In another class of case the intervenor had no legal title to the property which was subject to a deed of trust which it was sought to have reconveyed but had only an equitable interest by virtue of a contract sale to the intervenor by the original trustor under the trust deed. From the foregoing brief recitation of facts it can be seen what complications have had to be met in all intervention proceedings. Each proceeding has required from one to four court appearances by affiant.

204

In addition to the large number of actual proceedings in intervention, there is an infinite number of holders of real property affected by deeds of trust wherein Title Service Company is the trustee and Long Beach Federal Savings and Loan Association is the beneficiary, which persons are desirous of paying their loans in full. Many such persons have called affiant by telephone, or have called upon him personally, daily, in quest of information. Further, many such persons, firms, or corporations have corresponded with affiant on the same subject. Besides these, escrows have been opened by such persons with escrow holders located all over Southern California, and affiant has conferred with, corresponded with, or telephoned the officers of such escrow holders.

All of the above-described efforts by affiant in connection with title matters have had to be done to protect the titles to real property, which duty is imposed on Title Service Company by virtue of the terms of said deeds of trust, and to aid those innocent persons whose titles have been beclouded by the acts of the Defendants Fahey and Ammann, which acts have been found by the District Court to have been done without authority and pursuant to an unconstitutional act and their own regulations adopted thereunder.

The acts of the Defendants Fahey and Ammann, above referred to, have cast clouds on titles to approximately 8,000 parcels of real property. That it has been necessary to invoke the equitable aid of the United States District Court, in interpleader and in the nature of interpleader, by and on behalf of Title Service Company, to relieve itself of multiple and vexatious litigation, not only from liability to either the Defendants Fahey and Ammann on the one hand and the Defendant Long Beach Federal Savings and Loan Association, on the other hand, but

205

also from litigation threatened by trustors under deeds of trust who seek to obtain clear titles to their property. By virtue of the exclusive jurisdiction conferred upon the Federal District Court by the Interpleader Statute of the Judicial Code of the United States the matters are all confined to the Southern District of California.

From all of the foregoing recitation it is easily discernible how complex have been the problems with which counsel has been confronted. Each step in the litigation, as above set forth, and all advisory decisions and advice given to Title Service Company, have required highly concentrated and extensive research. How successful the same has been may well be judged from the outcome of all phases of the matter to date.

From the inception of this case affiant has devoted the larger part of his time to it. A more setting forth of the number of hours worked would not give a concrete picture of the efforts put forth. Since many decisions had to be made without delay and many pleadings had to be filed within a short time, the ordinary working day and working week had to be disregarded. On many occasions affiant worked until the early hours of the morning and on at least two occasions worked as much as thirty-six (36) hours without sleep. It was necessary that affiant, and he has, virtually disregarded any other practice of his profession which has suffered accordingly. That by virtue of all of the foregoing facts affiant verily believes that a fee has been earned commensurate with the amount of work done, the results achieved to date, the magnitude of the subject matter of the litigation and the responsibility placed upon him.

206 That the number of hours which affiant has spent exclusively on this matter to the 10th day of February 1947 is 975. As a mere recitation of the number of hours spent cannot accurately reflect the efforts expended in this matter by reason of the fact, as hereinabove set forth, that many night hours were consumed, that much of the time outside of regular office hours, over weekends and at times not only interferred with the rest of affiant's legal practice but also made it impossible for him to have normal recreational time and precluded him from taking any time by way of vacation.

Dated this 21st day of March 1947.

(S) H. O. Wallace.
H. O. Wallace.

Subscribed and sworn to before me this 21st day of March 1947.

[SEAL]

Hazel Roberts,
Notary Public in and for said County and State.

207 In the District Court of the United States in and for the Southern District of California, Central Division

No. 5421–P. H.

PAUL MALLONEE, C. H. NEWHOUSE, AND WINNIE BUCKLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR, AND ON BEHALF OF, ALL THE MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY, AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY, AND A. V. AMMANN, AS PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS

Affidavit of service by mail

affidavits of

1. Affidavit of Wyckoff Westover in support of motion for interim allowance of fees and expenses.
2. Affidavit of attorney Charles K. Chapman in support of motion of Long Beach Federal Savings and Loan Association for allowance on account of attorneys' fees.
3. Affidavit of H. O. Wallace in support of motion for allowance on account of attorneys' fees by title service company.
4. Affidavit of the Honorable John W. Preston.
5. Affidavit of L. R. Martineau, Jr., Esquire.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Leon Frazer, being first duly sworn, says:

That affiant is a citizen of the United States and a
208 resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above-entitled action; that affiant's business address is 348 East Fourth Street, Long Beach, California; That on the 21st day of March, 1947, affiant served two copies of the following affidavits:

1. Affidavit of Wyckoff Westover in Support of Motion for Interim Allowance of Fees and Expenses.
2. Affidavit of Attorney Charles K. Chapman in Support of Motion of Long Beach Federal Savings and Loan Association for Allowance on Account of Attorneys' Fees.

3. Affidavit of H. O. Wallace in Support of Motion for Allowance on Account of Attorneys' Fees by Title Service Company.
4. Affidavit of the Honorable John W. Preston.
5. Affidavit of L. R. Martineau, Jr., Esquire.

on the defendants in said action, by placing a true copy thereof in an envelope address as follows: John H. Fahey and A. V. Ammann, % James M. Carter, their attorney, 600 Federal Building, Los Angeles, California, and then by sealing said envelopes and depositing same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California. That there is delivery service by regular communication by mail between the place of mailing and the places so addressed.

(S) Leon Frazer.
LEON FRAZER.

Subscribed and sworn to before me this 21st day of March 1947.

[SEAL] (S) Fay V. Dealey.
FAY V. DEALEY.

209

JAMES M. CARTER
UNITED STATES ATTORNEY
RONALD WALKER
ASSISTANT U. S. ATTORNEY
Chief of Civil Division, 600 Federal Building,
LOS ANGELES, CALIFORNIA
Telephone: MAdison 7411

MOSE SILVERMAN, of Counsel.

In the District Court of the United States in and for the Southern District of California, Central Division

Civil Action File No. 5421–PH

PAUL MALLONEE, ET AL., PLAINTIFFS
v.
JOHN H. FAHEY, ET AL., DEFENDANTS

Resistance to motions

Comes now defendant, A. V. Ammann, individually and as conservator for the Long Beach Federal Savings and Loan Association, and in opposition to the various motions for allowances of expenses and attorney fees, states:

1. That he denies each and every allegation and statement in said motions contained except those that have heretofore been ad-

mitted by him in the pleadings filed in this case and except such statements as to the procedure in this case which are shown by the record to be true.

2. That the Court is without jurisdiction to hear and determine the motions for the reason that the granting of any relief by the Court other than through an interlocutory injunction restraining merger, consolidation or commingling of the Association or its assets with any other association, has been stayed by an order of the Supreme Court of the United States, entered on the first day of October 1946, and still in full force and effect.

3. That said motions constitute a contempt of the Supreme Court of the United States in that they are an attempt to secure the violation of a lawful order of that Court.

210 4. That a one-judge court is without jurisdiction to hear and determine said motions for the reason that a determination thereon would be final judgment on a part of the main action.

5. That the movants are estopped to secure reimbursement for attorney fees and expenses out of the funds of the Long Beach Federal Savings and Loan Association for the reason that they have agreed to represent the shareholders without personal liability upon said shareholders for any expenses of any kind and that said shareholders would not be called upon for any contribution; that payment of expenses and attorney fees out of the fund would be a compulsory contribution from said shareholders.

6. That no fund in the hands of the Court has been recovered or preserved through the efforts of the movants or their attorneys and that on the contrary if their efforts caused the payment into court of the sum of approximately $850,000 as they contend, the movants, instead of aiding the shareholders of said Association have injured them in so much as the fund thus paid into court bears no interest and produces nothing for the Association or for its shareholders.

7. That in no event are costs, fees, and expenses payable to the movants, their attorneys, or those associated with them, until they have finally been successful in the litigation.

8. That this action is now pending in the Supreme Court of the United States on an appeal from the decree of the District Court of the Southern District of California, Central Division, and until that appeal is decided no determination as to the rights to the fund in this court can be had, and the District Court is without jurisdiction to make any order which would put any part of the fund beyond the control of any decree which the Supreme Court may enter on the appeal.

9. That the action was not brought nor the interpleaders or cross-complaints filed to recover or preserve any funds for the

Association or its shareholders, but were brought solely to test the validity of the order appointing the conservator.

211 10. That the funds in the custody of the court are the property of the Long Beach Federal Savings and Loan Association and through it the property of all the shareholders of said Association; and that said funds were voluntarily deposited in court and were not brought into court by any action of the movants.

11. That the services of the movants and their attorneys and those associated with them were of no value to the said Long Beach Federal Savings and Loan Association or to its shareholders.

Wherefore, this defendant, upon the grounds above set forth and upon all the grounds heretofore alleged in the pleadings filed in this case, moves the Court that the motions for allowances of expenses and attorney fees be stricken from the files or in the alternative that they be denied.

Dated this — day of March 1947.

JAMES M. CARTER,
United States Attorney,
RONALD WALKER,
Assistant U. S. Attorney,
Attorneys for defendant, A. V. Ammann, Individually and as Conservator for the Long Beach Federal Savings and Loan Association.

739620—47——10

212

WESTOVER & SMITH
1007–1015 Pacific Southwest Bldg., 215 West Sixth Street
LOS ANGELES 14, CALIFORNIA
Phone Trinity 8791

In the District Court of the United States in and for the Southern District of California, Central Division

Civil File No. 5421 P. H.

Closing statement of plaintiffs in reply to resistance and supplemental points and authorities of resistors to motions for interim allowance of fees and expenses

PAUL MALLONEE, C. H. NEWHOUSE AND WINNIE BUCHLIN, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS, SUING FOR AND ON BEHALF OF ALL OF THE SHAREHOLDER MEMBERS OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, AN ASSOCIATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE UNITED STATES OF AMERICA, PLAINTIFFS

vs.

JOHN H. FAHEY, INDIVIDUALLY, JOHN H. FAHEY AS CHAIRMAN OF THE FEDERAL HOME LOAN BANK BOARD, A. V. AMMANN, INDIVIDUALLY AND A. V. AMMANN, AS THE PURPORTED CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, SUED HEREIN AS JOHN DOE ONE (CROSS-CLAIMANT IN INTERPLEADER), R. H. WALLIS, SUED HEREIN AS JOHN DOE TWO (CROSS-CLAIMANT IN INTERPLEADER), ET AL., DEFENDANTS

213

"SUB NOMINAE"

HOME INVESTMENT COMPANY OF LONG BEACH, A CORPORATION, INTERVENOR

vs.

PAUL MALLONEE, ET AL., *and* JOHN H. FAHEY, ET AL., DEFENDANTS IN INTERVENTION

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, DEFENDANTS AND THIRD PARTY PLAINTIFFS

vs.

FEDERAL HOME LOAN BANK, ET AL., THIRD PARTY DEFENDANTS

ROBERT H. WALLIS, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF

vs.

JOHN H. FAHEY, ET AL., THIRD PARTY DEFENDANTS

FEDERAL HOME LOAN BANK OF LOS ANGELES, ETC., THIRD PARTY DEFENDANT AND CROSS-COMPLAINANT

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, SOMETIMES KNOWN AS FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL., THIRD-PARTY CROSS-DEFENDANT

214 Come now the plaintiffs and make this their Closing Points and Authorities in Reply to the Resistance to the Motions, and in Reply to the Supplemental Points and Authorities in Support of Resistance to Motions, heretofore filed on March 24, 1947, by the defendant A. V. Ammann objecting to the hearing by this Honorable Court of the motions for an interim Allowance on Account of Attorneys Fees and Expenses heretofore expended, by the plaintiffs.

The defendant A. V. Ammann in his resistance to motions makes some eleven (11) statements which are factually incorrect in some particulars which cannot be allowed to pass without correction.

1. This is apparently a general denial of all facts and allegations not heretofore proved to be true.

The courts attention is respectfully directed to the fact that the resistor A. V. Ammann has not filed any counter affidavits, nor has he filed any verified denial of any of the allegations and facts presented by the plaintiffs and other parties in their affidavits and verified motions for interim allowances on account of fees and expenses.

Therefore, the facts stated in the plaintiffs and other parties verified motions and supporting affidavits stand uncontroverted, as well as being largely matters proven true by the record itself.

2. It is respectfully submitted that the stay of execution issued by the Honorable Justice Wiley Rutledge, dated October 1, 1946, does not prevent "the granting of any relief by the court other than through an interlocutory injunction restraining merger, consolidation, or commingling of the association or its assets with any

other association, * * *." The statement of the resistor under said item 2 is not strictly accurate.

As the said stay of execution is directed specifically to staying "the execution and enforcement of said decree * * *."

That said decree so stayed did not make any findings of fact, conclusions of law, or order, judgment, or decree as to at-
215 torney fees or expenses of plaintiffs and other parties, whatsoever or in any manner.

This Honorable Court's attention is further directed to item 14 (the last item) of the said decree which reads as follows:

"Now therefore, it is hereby ordered, adjudged, and decreed:

"(14) * * * There is reserved to the district court the right to make such further and other orders herein as shall hereafter be necessary to determine collateral issues hereto * * *."

It is respectfully submitted that this Honorable Court deliberately, and with foresight, especially reserved to itself the jurisdiction required to make necessary collateral pendente lite or independent orders, which jurisdiction has been exercised upon numerous occasions by this Honorable Court without objection from the resistors in the hearing, determining, and making of orders regarding intervenors and regarding various and numerous motions, etc., and the objector, Ammann, should not now therefore be heard to complain that the hearing, determining, and making of appropriate orders on collateral matters is in any wise contrary to the stay order issued by the Honorable Justice Wiley Rutledge, or in any wise in contempt of said orders.

3. The suggestion that these motions on the collateral matters of fixing an interim allowance on account of fees and expenses for plaintiffs and other parties constitutes a contempt of the Supreme Court of the United States comes with poor grace from these resistors who have on numerous occasions since October 1, 1946, the date of said stay order, made no objection to the hearing and determining of motions for intervention, and the making of orders pursuant thereto, and have claimed to be actively instrumental in consenting to and obtaining such orders in aid of clearing of intervenor's titles to real property, and who have been op-
erating, dealing with, expending, and paying out enormous
216 sums of money and property of the Long Beach Federal Savings and Loan Association belonging to these plaintiffs, including the payment of salaries to themselves and their staffs from the funds belonging to these plaintiffs.

This threat of contempt proceedings made by the resistors, is apparently an attempt to intimidate these plaintiffs, their counsel, and even this Honorable Court.

4. The suggestion that one judge of this Honorable Court is without jurisdiction to hear and determine these motions for the

reasons that such a determination would be a final judgment on part of the main action is without merit as the motions now being made are motions for interim allowance on account of fees and expenses, and are not a final determination. Irrespective of whether the United States Supreme Court affirms or reverses the judgment heretofore rendered by the Honorable Statutory Court composed of three judges, this litigation of necessity, will still have to continue for final determination on many matters, such as:

(a) In the event of reversal (1) determination of the validity and constitutionality of the rules and regulations. (2) Extended trials as to whether or not discretion, if any, had been properly exercised, or abused, by the defendants Fahey and Ammann and upon numerous other controversarial matter, or

(b) In the event of an affirmance (as we feel should and will be the decision rendered by the United States Supreme Court), even so, there will still remain substantial matters to be heard and determined. Such as: 1. Accountings by the defendants Fahey and Ammann. 2. Probably even supplemental actions for pos-
217 session of assets sequestered by them. 3. Determinations of cross-actions and interventions and interpleader matters.

The case of Trustees V. Greenough, 105 U. S. 527 (1881) at page 531, points out that in that case, as in this one, the litigation may continue for a long time to come and as subsequently pointed out in the case of Sprague v. Ticonic National Bank, 307 U. S. 161 (1938) at page 169, that the application for fees or costs "as between solicitor and client" was a collateral one of distinct and independent character and impliedly covered neither by the original decree nor by the mandate and that neither constituted a bar to the disposal of the petition below on its merits.

Point VII of the plaintiff's points and authorities attached to their motion for fees, to the effect that the final result of the litigation is not the determining fact in such motions has not been refuted by the resistor herein.

These decisions are in line with Rule of Civil Procedure #54, (b), permitting the making of orders upon a separate collateral matter or independent part claims which rule became effective on September 16, 1938.

5. The suggestion that the plaintiffs, the shareholder members Protective committee, and their counsel have agreed to carry the enormous expense of this entire litigation personally, is obviously too ridiculous to require serious answer, and is only another attempt by the resistors to misinterpret language. The printed phrase is the "authorization and proxies to shareholders committee" stating "we are not to be held personally liable for any expense" means just what it says, to wit, that the shareholder signing such authorization and proxy authorizing the shareholder

members protective committee to proceed with the litigation, does not expect to be held personally liable any more than a stockholder in a corporation who authorizes or votes for a course of action,

218 expects to be held personally liable yet of course, expects that the expenses of the litigation will be borne by the corporation, or out of the corpus of the fund, as it has always been a fundamental principle of equity that: "It is a general principle that a trust estate must bear the expense of its administration." Trustee v. G. Greenough, 105 U. S. 527, (1881).

It is pointed out that were the resistor's objection No. 5 to be followed, the funds on deposit of non-signing shareholder members would be subject to the payment of attorneys fees and expenses for the litigation, while the funds of shareholder members who had executed the printed authorization and proxy to the shareholder members protective committee to proceed with the litigation would be absolved from bearing their just proportionate part of the expenses and attorneys fees incident to the litigation. Such a result is obviously absurd.

No personal judgment against the individual shareholder member is sought by this motion for interim allowance on account of attorneys fees and expenses, but is to be paid out of the funds preserved.

6. The efforts of the movants and their attorneys in this litigation and the issuance by this Honorable Court of the temporary restraining order, followed by preliminary injunction, etc., prevented the resistor defendant Ammann and the defendant Fahey and their cohorts from merging, consolidating, or reorganizing the said association, and at least theoretically, prevented them from "uniting commingling, joining, or consolidating the securities, assets, cash resources, properties," and other assets of said association with other institutions, as they had previously done, with the assets of the Federal Home Loan Bank of Los Angeles.

The action of these movants and their counsel and this Honorable Court has preserved and kept available for the shareholder members of the Long Beach Federal Savings and Loan Association, a substantial portion at least of the original twenty-

219 six million dollars of assets of said association.

Had it not been for such prompt action by the movants, their attorneys and this court, there would have been no funds of said association available in Long Beach to meet the demands of the depositors who withdrew from said association some approximately ten millions dollars, aside from such funds, if any, as still remain available for the remaining shareholder members.

7. Numerous cases have already been cited, and other cases will be cited to the effect that the final result of the litigation is not

the sole determining factor, but that fees and expenses on account have been and can be allowed in this type of litigation from the funds preserved.

8. Likewise, item 8 is a question of law which will be answered by appropriate citations hereinafter. Factually, the only comment necessary is that the funds being expended by the resistors for the payment of their own salaries, billboard advertising, publicity and similar expenses are being paid by the resistors out of the funds belonging to these plaintiffs and payment so made to strangers to the litigation may properly be considered as beyond the control of any decree which the Supreme Court or this Honorable Court may enter.

9. The suggestion that the sole purpose for bringing the instant litigation was "to test the validity of the order appointing the conservator" is obviously incorrect, and highly misleading, as even a brief perusal of the seven parts of the two page prayer of the complaint filed by the plaintiffs will disclose.

10. It is agreed that the funds in the custody of this Honorable Court are the property of the Long Beach Federal Savings and Loan Association, and as such are the property of the shareholder member of the said association, who, through their shareholder members protective committee are the plaintiffs herein.

But the statement that said funds were voluntarily de-
220 posited in Court and were not brought into court by any action of the movants, is of course erroneous and false, as the funds on deposit in the registry of the court were placed there pursuant to order of this Honorable Court by various parties as the result of interpleaders and intervenors resulting from the commencement of this action by plaintiffs and the service of summons and complaint upon the trustee Title Service Company and other parties.

A major portion of said funds, more than $770,000 thereof, were deposited in court by the Home Investment Company, who was brought into the action by the interpleader of the Title Service Company filed in response to the complaint and summons served upon it by the movant plaintiffs herein, required by the unlawful seizure and hence can hardly be deemed to have been a voluntary action.

11. The conclusion stated by the objectors in paragraph 11, that the services of the movants and their attorneys have been of no value to the Long Beach Federal Savings and Loan Association, or its shareholders is a conclusion solely of the objectors and is contrary to the facts.

The services of the movants, and their attorneys and those associated with them, have prevented the defendant objector Ammann and defendant Fahey and their cohorts from visiting upon

the Long Beach Federal Savings and Loan Association, the same fate which was meted out by them to the Federal Home Loan Bank of Los Angeles, to wit, dissolution and dissipation.

As to the amount of fees to be allowed, it is respectfully submitted that even though substantial fees, commensurate with the work done, are allowed, the percentage of the amount allowed for fees to the amounts involved will be comparatively nominal.

In this action, the fund involved was $26,000,000.00 in assets, which defendant Ammann admits in his inventory that he seized when he took the Long Beach Federal Savings and Loan Association. 1% of $26,000,000 is $260,000. ½ of 1% is $130,000.

221 Defendants Fahey and Ammann, so proud of their destruction of the association, will probably direct the Court's attention to the fact that there are $10,000,000 less in deposits now than when they took over and that there are many thousand fewer shareholders. This is undoubtedly true, but should the Court be thus dissuaded from making the allowance, defendants Fahey and Ammann would need only to completely succeed in destroying the institution, which would then have no shareholders and no assets and on this theory would allow no fees. The real answer, of course, is that the allowance of fees comes out of the $1,300,000 surplus which defendants Fahey and Ammann have not yet succeeded in merging, dissolving, or liquidating, at least so far as known to the public. This is the same surplus built up over the twelve years growth by those from whom Fahey and Ammann seized the association.

It therefore appears that the motion of the objector Ammann to strike, or in the alternate, to deny the motion for allowance of expenses and attorneys' fees by the movants is without factual support and should themselves be denied; and further that an order directing the Clerk of this Court to pay to the plaintiffs and to their attorneys out of the funds now on deposit in the Registry of this Court a reasonable allowance on account of attorneys' fees and expenses advanced should be made.

Dated at Los Angeles this 28 day of March 1947.

Respectfully submitted.

WESTOVER & SMITH,
By (S) WYCKOFF WESTOVER,
Attorneys for Plaintiffs.

Opinion of the court

(April 7, 1947)

The COURT. As I indicated, I think that a stay order here prevails over the general rule of supersedeas, and that under the terms and provisions of the stay order the only thing that is stayed is the "execution and enforcement of said decree."

I cannot see how consideration and action upon the various motions and petitions here would affect the "execution" or the "enforcement" of the decree. As I indicated before, if this Court has no power to consider this matter, then it has had no power to consider any of the petitions in intervention which involved title to real estate.

I do not think that the Justice of the Supreme Court, with none of the records and files in this case before him at the time the stay order was made, intended to so tie up the matter of the management of titles to property as would occur if the lower Court's, that is, this Court's hands were entirely tied in connection with all matters and everything pending or concerned in the litigation.

There is nothing before me in these proceedings which looks to the "execution" or "enforcement" of the stayed decree.

It is significant that when a petition to set aside the stay order was presented and it was referred to the entire Court, if they had intended the stay to be broader, that they did not at that time make it broader than it is.

Moreover, it seems to me that even though I may be wrong in that respect, the exception which is specifically made in the stay order, that is, concerning the merger or consolidation of the association or commingling its assets with any other association, would permit this Court to give consideration to and act upon an application for attorney's fees.

This is an equitable proceeding and the Court's power, as in all equitable proceedings, is broad and is not confined to the strict limits of precedent. In other words, the Court in each equity case is bound to see if there is a precedent—and I find none here against the action in this case, and a great deal which would favor it—is nevertheless under the duty to act as a court of conscience, that is, to do what is right. It seems to me that it is right that the Court should act here because, as I pointed out, the money that is involved in this litigation does not belong to the defendant Government officials, it belongs to the shareholders. It is their fund. The litigation is to preserve the fund for its rightful owner, and part of the litigation is to determine who is its rightful owner. It seems to me that it would be contrary to the course of equity and of good conscience to deny the allowance of any fees here because it

would be in effect compelling judgment by default on the part of the stockholders' committee and those who are here seeking to prevent the validating of the seizure.

What I am trying to say there is that it being their money, if this Court would deny them the use of it, it would in effect say to those people whose money it is and who have some right at least in saying what shall be done with it and who shall manage it, "Well, you cannot litigate." And I indicated, I think the proceedings are somewhat analogous to a divorce proceeding where interim allowances are made for fees and costs even though ultimate relief of any kind may be denied to the litigant.

I am not satisfied at this time that I should make an allowance for three different sets of lawyers, however. I am satisfied that the shareholders' committee who initiated the litigation, who promptly sought compliance with the California law and secured a license from the Corporation Commissioner of the State of California, to act as a shareholders' committee, are entitled to an allowance on account and are entitled to an allowance of their costs up to March 1st, an allowance on account of fees up to March 1st, but not a total allowance of fees up to March 1st.

In other words, I do not want to make an appraisal of the total value of their services which were rendered up to that date at this time. I think that if the time comes when the total value of their earnings should be appraised that perhaps it should be explored more by way of oral testimony and opportunity of cross-examination, which the resistor could have had here at this time if they chose to factually oppose this, but they chose not to do at this time.

I am not satisfied that it would be right or legal for me at this time to make an allowance, either to the counsel for the association, or to the counsel to the Title Service Company, but in that connection I do not wish to be understood as saying that I have concluded finally that they are not entitled to any compensation. It would seem to me that ultimately they might be entitled to be compensated from the general fund. But at this stage of the proceedings I do not think that I would be justified in making an award to them either for their costs to date or on account of fees.

According to the affidavits on file Mr. Daniel W. O'Donoghue, Jr., was retained by and rendered services to the shareholders' committee, although he consulted with the other counsel in that connection, so I would think that he would be entitled to his costs.

There is no contrary affidavit or evidence offered or permission requested to refute the total amount of costs expended to date by the shareholders' committee, which is $15,530.29, nor the shareholders' counsel, that is to say, Westover & Smith, of $1,534.77, nor Mr. O'Donoghue of $230.07. So I will make an order allowing the repayment of those costs to March 1st as filed.

As indicated, I think that the counsel for the shareholders' committee should have an allowance on account. I have read with interest the affidavits of Justice Preston and of Mr. Martineau, both of whom have participated in litigation of similar size and consequence and responsibility and who were both well equipped, in my opinion, to render an opinion as to the value of services.

Justice Preston fixes in his opinion the total value of the total services rendered to March 1st as $125,000, Mr. Martineau fixes the total value of the total services I believe at $115,000, and each of them gives his estimate of the proportion that shall be divided among the counsel.

I stated, however, that I do not wish to be understood as making any final decision concerning the final value of services to anyone, but I do believe that counsel of the firm of Westover & Smith should have an allowance on account in the sum of $50,000, and that will be the order of the Court, deferring, however, the matter of any final judgment, that is, when I say final judgment I mean to say any judgment as to the total value of their fees. This is only partial and on account. Do I make myself clear?

Mr. DOUGHERTY. Yes.

The COURT. Until such future day as circumstances may make it convenient to decide, and reserving also any judgment whatsoever as to whether or not the counsel for the association itself or the counsel for the Title Service Company are or are not entitled to any compensation. Is that clear to everybody?

Mr. WALLACE. Your ruling amounts to a denial without prejudice?

The COURT. No; I am not denying it. I am just reserving judgment upon your request and upon Mr. Chapman's request, both as to the reimbursement as to cost and payment of any fees.

Mr. DOUGHERTY. May I inquire if Your Honor has in view Rule 62, which gives an automatic stay of 10 days of this order and judgment? I may say, your Honor please, that I think Rule 54 indicates that such an order is a judgment within the meaning of the rule.

The COURT. I would think that it probably would be, as well as under Section 792, but I do not mean that it shall be a final judgment in the sense that that is the total amount that they should be allowed.

Mr. DOUGHERTY. All I am interested in is whether or not we will have time without too much urgency in view of the telephone strike to make an attempt to have a review. I will assure you that it will be done with all promptitude possible.

The COURT. I think there ought to be a written order on this matter.

Mr. WESTOVER. I think there should be also.

Mr. WALKER. I was somewhat concerned about the written order too, Your Honor. Is the order to be directed to the Clerk to pay from the funds in his hands?

The COURT. The order is to be directed to the Clerk to pay the money from funds now on deposit with the court. I do not know whether I can or whether it will be necessary, but I would like to indicate that the money should ultimately be taken from the surplus, which is undenied, the $1,300,000 surplus. I do not know whether that can be done in this order or not.

Mr. CHAPMAN. I think, Your Honor, it can be.

Mr. WALKER. Mathematically it will come from there in the last analysis anyhow.

The COURT. I would think it would.

Mr. WESTOVER. Assuming there is a surplus when we obtain it.

The COURT. There was a surplus and that is undenied. On second thought I doubt if that ought to be a subject matter of the order. It would appear to me that the execution would be automatically stayed. In any event, it will take a day or so for them to get the order ready and to submit it to you for your approval as to form.

Mr. WALKER. Your Honor, in reserving the ruling on the other two applications for fees, are we to consider that as matter submitted to the Court? It leaves it rather indefinite. I do not know just how to classify it.

The COURT. I do not either, except that that is what I want to do. What is going through my mind in that connection at this moment is this—well, I do not know when the future or convenient date would be—but assume that the litigation should in the next year or so be able to be consummated and terminated. I think at that time there ought to be a general round-up of all matters undisposed of, such as this. Now it may be that in the meantime the parties will be able to demonstrate that allowances should be made to them in any event, but I would have to hear the matter over again at that time.

Mr. WALKER. Then I wonder, would it be proper for the other two motions to go off calendar at this time?

The COURT. Yes; I think perhaps that would be the better order of the Court.

Mr. WALKER. To be reset on order of the Court.

The COURT. The motions of Mr. Chapman and Mr. Wallace will go off calendar and there will be no other order made on them, to be reset upon notice or on the Court's own motion. I think that would be better than attempting to make another order. Is that all?

Mr. WESTOVER. I take it, Your Honor, that that can probably all be covered in one order, the entire matter of off calendar and so forth?

The COURT. As to those that go off calendar, that is merely a minute order.

Mr. WESTOVER. Very well.

The COURT. There need be no written order in connection with them. It is a minute order. The order allowing the fee will be only in connection with your application and costs.

Mr. WESTOVER. And an allowance made to Mr. O'Donoghue our Washington representative. That is the one matter undisposed of in our application, Your Honor.

The COURT. I think you had better settle that with Mr. O'Donoghue. I did not indicate, but it seems to me that that is a matter between you and Mr. O'Donoghue.

Mr. WESTOVER. Very well.

The COURT. The order will provide that the money is payable to Westover & Smith, because Mr. O'Donoghue is working for you, so Westover & Smith can make out of that fund any interim allowance on account to Mr. O'Donoghue as shall be agreed upon between the parties. Otherwise all other matters will go off calendar, and we are recessed until 10:00 o'clock tomorrow morning.

Certificate

I hereby certify that I am a duly appointed, qualified, and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8th day of April A. D. 1947.

AGNAR WAHLBERG,
Official Reporter.

U. S. GOVERNMENT PRINTING OFFICE: 1947

SUPREME COURT OF THE UNITED STATES

No. 133, MISC.—OCTOBER TERM, 1946.

Ex Parte John H. Fahey and A. V. Ammann, Individually and Respectively as Federal Home Loan Bank Commissioner and Conservator for the Long Beach Federal Savings and Loan Association.

[June 23, 1947.]

MR. JUSTICE JACKSON delivered the opinion of the Court.

This petition by John H. Fahey, individually and as Federal Home Loan Bank Commissioner, and A. V. Ammann, individually and as Conservator for the Long Beach Federal Savings and Loan Association, invokes the original jurisdiction of this Court. They ask leave to file petition for a writ of "mandamus and/or prohibition and/or injunction" against Judge Peirson M. Hall of the United States District Court for the Southern District of California to vacate his order allowing fees to counsel in *Fahey* v. *Mallonee*, decided today, to prohibit any further allowance therein, and to enjoin any payments heretofore allowed.

While an appeal in the principal case was pending in this Court, application was made by various counsel for the plaintiffs and associated interests therein for allowance of fees aggregating some $125,000. The District Court allowed counsel for plaintiffs $50,000 as a partial payment on account of services, but withheld action on other applications. Certain costs and expenses of the plaintiffs in the amount of $17,295.13 were also ordered reimbursed.

The petition involves serious questions of law and of fact. Whether, because of the pendency of the appeal and

the stay order granted therein, the District Court had power to entertain the application, whether before the final outcome of the case could be known an allowance was premature, whether the source of the fund on deposit with the court was so related to the services as to be subject to disbursement for their compensation, and whether one judge can make allowances in a case before a three-judge court, are, with other questions, much contested. We do not decide any question as to the merits.

Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes.

We find nothing in this case to warrant their use. An allowance of $50,000 will hardly destroy a twenty-six million dollar association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs.

The petition is

Denied.